TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

IN THE

Supreme Court of the United States

October Term 1971

No. 71-507

WILFRED KEYES, et al,

Petitioners,

vs

SCHOOL DISTRICT NO. 1, DENVER COLORADO, et al,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENTS

OPINIONS BELOW

The principal opinions of the courts below are adequately set forth in the Brief for Petitioners.

JURISDICTION

The jurisdictional statement is adequately set forth in the Brief for Petitioners.

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

QUESTION PRESENTED

The sole question presented by Petitioners is: Whether petitioners are entitled to obtain system-wide relief to desegregate the Denver Public Schools. Four legal theories are propounded thereunder by Petitioners.

STATEMENT

The Brief for Petitioners contains a complex and lengthy statement. Portions thereof consist of preliminary findings of fact by the district court made following a hearing on motion for preliminary injunction, which are not supported by the ultimate findings made after a full hearing on the merits; portions consist of reiteration of some findings of fact and additional new findings of fact by the trial court after the hearing on the merits; portions pertain to asserted inferences from facts in evidence but not adopted by the trial court in its findings of fact; portions consist of conclusions of counsel but not of the lower courts; and other portions contain argumentative matters. For these reasons, respondents present a detailed statement to put this case in proper chronology and perspective.

1. PROCEDURAL HISTORY.

This action was commenced in the United States District Court for the District of Colorado on June 19, 1969, by Anglo (white, excluding Hispano), Negro, and Hispano (Spanish surnamed) parents of children attending public schools in Denver, Colorado, suing individually, on behalf of their minor children, and, under Rule 23, Federal Rules of Civil Procedure, on behalf of classes of persons similarly situated. They alleged violations of their constitutional rights and sought reinstatement of certain rescinded resolutions of the Board of Education, desegregation of certain schools alleged to have been segregated by acts of the Board

of Education, desegregation of the entire district, and other relief.

The complaint contained two separate causes of action.[1] The first cause of action addressed itself only to a small number of schools in a portion of northeast Denver known as Park Hill, and alleged that the rescission of three resolutions of the Board of Education numbered 1520, 1524, and 1531, containing plans for stabilization of the racial and ethnic pupil composition of those schools ("resolution schools") in northeast Denver was unconstitutional and void and prayed that the resolutions be reinstated by order of the court.

The three resolutions contained plans for reassignment of pupils from eight northeast Denver neighborhood schools to other schools more distant. Only four of the eight were predominantly Negro and none was predominantly Hispano.

The second (main) cause of action alleged the existence of racially and ethnically segregated residential patterns in Denver, and with knowledge thereof, the superimposition by the Board of a "neighborhood school policy" resulting in state imposed segregation on the basis of race and ethnicity at schools in the central or core city area of Denver ("core city schools") and an unequal allocation of facilities, resources and faculty to predominantly minority schools of the school district.

Although various forms of relief were sought, the Question Presented herein by petitioners is limited to the refusal of the lower courts to order system-wide "desegregation" in the Denver schools.

[1]Joint Appendix, pp. 2a-70a, hereinafter cited A. For ease of reference, the citation conventions adopted by petitioners in footnote 3 of their brief will be used in this brief. The Appendix to Petition for Certiorari is hereinafter cited as "A.P.", the Brief for Petitioner is cited as "Pet. Br."

Only the first cause of action was considered on motion for preliminary injunction to reinstate and implement the three rescinded resolutions. After hearing in July of 1969, the district court granted the preliminary injunction, holding the rescission unconstitutional.[2]

On application for stay of the preliminary injunction, the Tenth Circuit Court of Appeals remanded the case to the district court to make its injunction more specific and for consideration of the applicability of section 407(a) of the 1964 Civil Rights Act, 42 U.S.C. §2000c(6)(a).[3]

On remand the district court held section 407(a) of the Civil Rights Act of 1964 inapplicable and made its injunction more specific by ordering implementation of the resolutions as to five elementary schools, only three of which were predominantly minority and the one junior high school they fed, a total of only four minority schools. It reserved ruling on the second minority junior high school involved in the resolutions until trial on the merits.[4] The court also held that East High School, one of the eight resolution schools, was not within the ambit of a preliminary injunction because of section 407(a) and because the evidence failed to disclose a condition at East which merited a preliminary injunction (East was and has remained predominantly Anglo.)[5]

On August 27, 1969, the court of appeals stayed the preliminary injunction until further order of court stating that the important and difficult questions presented in the case

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[2]Opinion of the District Court of July 31, 1969, 303 F.Supp. 279, A.P. 18a and 19a.

[3]Opinion of the Court of Appeals of August 5, 1969. A. 455a.

[4]Opinion of the District Court of August 14, 1969, 303 F.Supp. 289, 296, A.P. 37a.

[5]Opinion of the District Court of August 14, 1969, 303 F.Supp. 289, 299, A.P. 43a.

should not be decided on application for preliminary injunction and questioned the piece-meal consideration of the case.[6]

On August 29, 1969, the Friday before the opening of school on September 2, 1969, Mr. Justice Brennan, Acting Circuit Justice, reinstated the preliminary injunction on the grounds that the stay was improvidently granted, the court of appeals not having said that the grant of the preliminary injunction was an abuse of discretion.[7]

The court of appeals on September 15, 1969, denied a motion to amend its August 27, 1969, stay order to specifically hold that the district court abused its discretion in granting the preliminary injunction, the schools having opened in compliance therewith and any change at that time would have had a disruptive effect on them.[8]

After trial on the merits from February 2 to February 24, 1970, the district court, in an opinion dated March 21, 1970, "considered the explanatory evidence offered at trial" (313 F.Supp. 61, 64, A.P. 46a) as to the first cause of action and made specific findings of fact and conclusions of law concerning the resolution schools reiterating the finding of unconstitutional rescission of the three resolutions. The court made the injunction permanent and included therein the second minority junior high school and one high school (East High), although it was a predominantly Anglo school. The court further held that the racial imbalance in the schools which were the subject of the second cause of action (core city schools) was not caused by state action, but that the schools which were over 70% Negro or over 70%

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[6]Opinion of the Court of Appeals of August 26, 1969. A. 459a.

[7]*Keyes v. School District No. One*, 396 U.S. 1215 (August 29, 1969). A. 463a.

[8]Opinion of the Court of Appeals of September 15, 1969. A. 467a.

Hispano were not providing an equal educational opportunity in violation of the Fourteenth Amendment.[9]

The district court issued a "Decision re Plan or Remedy" on May 21, 1970, after a further hearing on remedies and ordered a plan of massive compensatory education and the desegregation of seventeen "court designated" schools—fourteen elementary, two junior high and one senior high, all located in the core city area of Denver—which it concluded were not providing an equal educational opportunity, although not segregated by state action.[10] These included two elementary and one junior high resolution schools.

A Final Decree and Judgment was entered on June 11, 1970,[11] which was appealed by both parties. After a stay by the court of appeals[12] pending decisions of this Court in *Swann v. Charlotte-Mecklenburg Board of Education* and other cases was vacated by this Court, per curiam,[13] following the announcement of its decision in *Swann*[14] and other cases, the court of appeals issued its opinion on June 11, 1971.[15]

The court of appeals affirmed the holding of the district court on the first cause of action, not on the grounds of unconstitutional rescission of the three resolutions, but instead on the basis of certain school districting in the Park Hill area involving only four predominantly minority schools; af-

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[9]Opinion of the District Court of March 21, 1970, 313 F.Supp. 61, A.P. 44a.

[10]Opinion of the District Court of May 21, 1970, 313 F.Supp. 90, A.P. 99a.

[11]A. 1970a.

[12]Opinion of the Court of Appeals of March 26, 1971, A. 1981a.

[13]*Keyes v. School District Number One, Denver, Colorado,* (April 26, 1971). A. 1984a.

[14]402 U.S. 1 (1971).

[15]Opinion of Court of Appeals of June 11, 1971, 445 F.2d 990, A.P. 122a.

firmed the findings of the district court that the core city schools which were the subject of the second cause of action were not segregated by state action; and reversed the judgment of the district court decreeing desegregation of the court designated schools on the ground that its decree was beyond the power of the court, there having been no state action causing the "de facto" segregation and therefore no constitutional violation.

Plans to implement the district court's Final Decree and Judgment regarding desegregation of the court designated schools were formulated and approved by the district court prior to the announcement of the opinion of the court of appeals on June 11, 1971, but were not implemented because of the reversal of the district court's decision in the interim.

As a result of an opinion of the court of appeals issued on August 30, 1971,[16] on motion for clarification, the district court ordered additional cross-busing to further reduce minority percentages at two elementary schools in northeast Denver[17] which were determined by the court of appeals in its June 11, 1971, opinion to be "de jure" segregated independently of the rescission of the three resolutions of the Board of Education. That order was implemented in January of 1972, after this Court granted certiorari on January 17, 1972.

2. THE CITY AND COUNTY OF DENVER AND SCHOOL DISTRICT NO. 1.

A. *Political System*

The City and County of Denver was created as a home rule city by amendment to the Constitution of Colorado in 1902 and has a mayor-council form of government. Article

[16]Opinion of Court of Appeals of August 30, 1971. A. 1987a.

[17]Stedman and Hallett, both of which were resolution schools.

XX of the Constitution of Colorado provides in pertinent part:

> "Section 7. City and county of Denver single school district—consolidations.—The city and county of Denver shall alone always constitute one school district, to be known as District No. 1, but its conduct, affairs and business shall be in the hands of a board of education consisting of such numbers, elected in such manner as the general school laws of the state shall provide. . . .
>
> * * *
>
> "Upon the annexation of any contiguous municipality which shall include a school district or districts or any part of a district, said school district or districts or part shall be merged in said 'District No. 1,' which shall then own all the property thereof, real and personal, located within the boundaries of such annexed municipality, and shall assume and pay all the bonds, obligations and indebtedness of each of the said included school districts, and a proper proportion of those partially included districts . . . ."

The respondent School District No. 1 was thus created by the Constitution of Colorado along with the City and County of Denver in 1902. The school district is governed by a seven-member board of education elected for staggered six-year terms and is both fiscally and politically independent from the city and county. The boundaries of these two political subdivisions are identical. Until 1967 the City and County of Denver had exclusive control over annexation of surrounding lands into the city and county and, by virtue of the Constitution, into School District No. 1. Since then, con-

templated annexations must be approved by School District No. 1.[18]

B. *Geography*

Geographically, Denver is roughly square, (See map, Appendix to respondents' Brief in Opposition to Petition for Certiorari) approximately 11 miles north to south and 9½ miles east to west, or approximately 100 square miles. The South Platte River flows from south to north curving to the west near the center of the city. The principal business and commercial area is located in the center of the city.

Denver's major growth has been to the east and south over the past 25 years, much of it by territorial annexation of undeveloped land, subsequently developed primarily for residential uses, neighborhood business and suburban shopping centers. The annexations to Denver since World War II have totaled approximately 40 of Denver's present 100 square miles. DIX L, A. 2148a; DX HK, A. 2158a; and PX 20, Map No. 2, A. 2018a.

C. *Demography*

The city of Denver is most densely populated near its center. In the early 1940's, the relatively small Negro population lived in a rather small area immediately north of the center of the city, commonly called "Five Points". A.P. 47a. Hispanos generally lived further to the north, as well as to the south and west of the city's center. After World War II, the Negro population increased in size substantially and, supplemented by immigration from other areas of the country, migrated to the east.

A large number of the Negroes who came to Denver after the war were from the rural South, unskilled, partially edu-

[18]Colorado Revised Statutes 1963, §139-21-4(5).

cated, burdened by traditions of legally imposed inequality, and unable to compete successfully. PX 20, A. 2001a.

A large number of the Hispanos came from New Mexico and southern Colorado, forced to the city by the closing of mines, the seasonal nature of agricultural work and mechanization of farms, bringing value patterns and cultural characteristics which interfered with adjustment to urban life. PX 20, A. 2002a.

The change in population is reflected by the following statistics:[19]

	Anglo		Negro		Hispano		Others		Total
Year	No.	%	No.	%	No.	%	No.	%	Population
1930	279,814	97.2	7,204	2.5	Incl. in Others		843	0.3	287,861
1940	313,810	97.3	7,386	2.4	Incl. in Anglo		766	0.3	322,412
1950	397,491	95.6	15,059	3.6	Incl. in Anglo		3,236	0.8	415,786
1960	398,332	80.7	30,251	6.1	60,294	12.2	5,010	1.0	493,887
1970	371,842	72.3	47,011	9.1	86,345	16.8	9,480	1.8	514,678

Following World War II, the Negro population began to migrate eastward and by 1950 had reached York Street, a main north-south thoroughfare. Between 1950 and 1960, the migration continued eastward from York Street to Colorado Boulevard, another principal north-south six-lane thoroughfare which the trial court recognized as a natural dividing line. 303 F.Supp. 282 and 290, A.P. 4a, 21a. In the early 1960's, the Negro migration continued to the east of Colorado Boulevard into a middle class residential area known as Park Hill and on to the easterly city limits. 313 F.Supp. 64, A.P. 47a.

The change in the Negro population between York Street and Colorado Boulevard is roughly reflected in the following figures:[20]

[19]Source. U.S. Bureau of Census.

[20]PX 38, Table 3, p. 6, A. 2116a; U.S. Bureau of Census for 1970 figures.

Year	Negro Population	Total Population	Percent Negro
1940	86	12,482	0.7
1950	898	16,028	5.6
1960	8,715	17,216	50.6
1970	10,506	15,047	69.8

The Park Hill population changes, Colorado Boulevard eastward to Quebec Street, are shown by the following figures:[21]

Year	Negro Population	Total Population	Percent Negro
1950	54	20,201	0.3
1960	566	32,679	1.7
1966	12,222	32,944	37.1
1970	18,516	36,893	50.2

The 1966 census of the Park Hill area was conducted by petitioners' witness Bardwell in a study for the City and County of Denver (not the School District), wherein he made the following concluding remarks:

> "If one adopts the position that a balance and stable mixture of Negro and white residents in Park Hill is a desirable public goal, the results of the 1966 census are not encouraging. There is ample evidence that the Negro movement into Park Hill is persistent and growing in momentum. The results suggest that a massive shift in racial composition in new residents moving into the area will be required to reverse this trend.
>
> "A number of factors suggest a continuing and mounting pressure for school facilities. The aver-

[21]PX 38, Table 4, p. 6, A. 2116; U.S. Bureau of Census for 1970 figures.

age size Negro family in the 1966 census is about one-fourth larger than the white family in the 1960 census. This disparity is even more pronounced if the average white family in the 1966 census is used. Moreover, there is a relatively high vacancy rate in 'transitional' areas in Park Hill. These factors, together with the prospect of higher proportion of Negroes in Park Hill, point to an impact on school populations which is likely to be more severe than that experienced to date." PX 38, p. 23, A. 2116a.

The Hispano population of the city of Denver also migrated but over a larger and less well-defined area, generally north and west of the city's center. The record does not reflect the Hispano movement as clearly as it does the Negro movement. An example which is typical, however, is illustrated by Boulevard Elementary School, in an older section of west Denver, which in 1946-1947 had an enrollment of 576 whites (93.4%), no Negroes and 31 Hispanos (6.6%). PX 336, A. 2084a. The 1969-1970 enrollment for Boulevard was 118 Anglo (30.3%), 2 Negro (0.5%) and 269 Hispano (69.1%). DX S-1, A. 2166a. The older part of the school was demolished and not replaced prior to 1969.

The Five Points area and the Hispano residential areas just north and west of the city's center had the lowest median family income and the lowest adult educational attainment level in 1960. The Park Hill area was near the median of family income for the same year, and the areas in the south and southeast parts of the city showed the highest median family income. PX 20, Map No. 5.

Population mobility was highest in the area of the core city schools. As examples, Emerson Elementary School and Morey Junior High School each experienced pupil popula-

tion mobility of over 100% during a single school year. Oberholtzer, A. 1361a.

In summary, Denver experienced normal growth prior to World War II, but shared in the dramatic postwar population movement to the cities, perhaps more than some cities because its territorial annexation policy in the 1940's, 1950's and 1960's enabled it to accommodate more of the population influx than some metropolitan areas where growth has been primarily in the suburbs.

3. DENVER'S SCHOOLS

A. *General Background*

At the time the action was commenced, School District No. 1 operated 118 schools consisting of 92 elementary schools, 15 junior high schools, 9 senior high schools including 2 junior-senior high schools, an opportunity school and a metropolitan youth education center.

At the beginning of the school year 1968-69, immediately prior to the commencement of this action, Anglo students were enrolled in all 92 elementary schools, Negro students in 78, and Hispano students in 88. Anglo students were enrolled in all 15 junior high schools, Negro students in 14 of the 15, and Hispano students in all 15. Anglo and Hispano students were enrolled in all 9 senior high schools and Negro students in 8 of the 9. PX 242, A. 2051a; PX 273, A. 2075a; and PX 302, A. 2079a.

Prior to 1947, a racial and ethnic survey had been taken annually by the school district. Oberholtzer, A. 1309a. When Kenneth E. Oberholtzer took office as Superintendent of Schools that year, there was brought to his attention the existence of published reports of racial data and the provisions of the Constitution of Colorado, Article IX, Section 8, which provides in pertinent part:

> "Section 8. Religious test and race discrimination forbidden—. . . No sectarian tenets or doctrines shall ever be taught in the public schools, nor shall any distinction or classification of pupils be made on account of race or color."

The superintendent sought and received advice of counsel (A. 1309a) and was advised that the survey conflicted with the constitutional provision. He thereupon directed that the practice be discontinued. A. 1309a. This continued as the policy of the administration and the Board until 1962, when racial and ethnic surveys of pupils and teachers were made in May of that year as a result of the need to have such data available for the Office of School-Community Relations and the Special Study Committee created that year. A. 1352a. These surveys were made annually thereafter by observations of pupils in the classroom in the fourth week of September in each year. No indication of race appeared on the individual records of the pupils.

The time frame covered by this lawsuit coincides approximately with the tenure of Dr. Oberholtzer as superintendent of the Denver schools from 1947 to his retirement in 1967.

During those twenty years the school population more than doubled from 45,000 to over 97,000 pupils and the number of classroom teachers increased from approximately 1600 to more than 4000.[22] Over 100 million dollars was spent during that time for construction and equipping school facilities in all areas of Denver to accommodate this school population explosion. Oberholtzer, A. 1304a, Map PX 20, A. 2018a. Yet funds were never adequate to provide schools in all locations where they were needed to accommodate Denver's growing and shift-

[22]Oberholtzer, A. 1306a. See also comparative data, 1940 to 1969, DX HK A. 2158a.

ing school population, particularly in newly annexed areas from which children had to be transported to the nearest available spaces in their grade levels.

Sizeable capital outlays were expended on renovation and maintenance of older buildings and facilities to keep them in good condition and provide up-to-date lighting, seating and other educational equipment. Oberholtzer, A. 1365a.

Schools were constructed over the years where they were needed to accommodate resident pupils without regard to the race or color of the pupils until 1964. Oberholtzer, A. 1316a, 1317a, and A. 1370a.

These schools reflect the racial and ethnic composition of the areas of the city that they serve. As that composition changed, so did that of the schools.

There is no evidence that the school district or any other governmental agency either caused or had any control over the changing racial characteristics of the neighborhood areas involved.

The public policy of the State of Colorado as shown by its laws and decisions was to prohibit discrimination based on race and protect the right of the individual to choose his place of residence regardless of race, creed, color, sex, national origin or ancestry.[23]

Section 4 of Colorado's Enabling Act provided in pertinent part:

> "... whereupon the said convention shall be and is hereby authorized to form a constitution and

[23]The Supreme Court of Colorado in *Capitol Federal Savings and Loan Association v. Smith*, 136 Colo. 265, 316 P.2d 252 (1957) went further than this Court in *Shelley v. Kraemer*, 334 U.S. 1 (1948) and following cases, when it held that no rights, duties or obligations whatever could be based on a private racially restrictive covenant on real property and, in essence, declared such covenants absolutely void.

state government for said territory; provided, that the constitution shall be republican in form, and make no distinction in civil or political rights on account of race or color. . . ." Colorado Revised Statutes 1963, Vol. 1, p. 52.

In 1895, Colorado enacted statutes prohibiting discrimination in public accommodations. Colorado Revised Statutes 1963, Section 25-1-1. Subsequent, statutes in 1917 broadened the anti-discrimination provisions. Colorado Revised Statutes 1963, Section 25-2-3. In 1957, The Colorado Antidiscrimination Commission was created, which has since been granted broader powers. Colorado Revised Statutes 1963, Chap. 25, Art. 3. The Colorado Fair Housing Act of 1959 (Colorado Revised Statutes 1963, Chap. 69, Art. 7) made it unlawful and prohibited a person having the right of ownership or possession to real property to refuse to transfer, rent or lease to any person because of race, creed, color, sex, national origin or ancestry; or to discriminate against such persons in connection with housing, including lending, making of restrictions, advertising or aiding or abetting such conduct. Jurisdiction was given to The Colorado Antidiscrimination Commission to enforce the provisions thereof with appropriate judicial review and enforcement. (Laws of 59, p. 489; Chap. 69, Art. 7.)

In the period shortly after *Brown v. Board of Education* 347 U.S. 483 (1954), Superintendent Oberholtzer requested opinion of counsel and was advised that *Brown* did not apply to Denver as it did not have separate schools for the races and *Brown* applied only to state-imposed dual systems and not to racial imbalance in schools resulting from residential concentrations. Oberholtzer, A. 1310a.

B. *Pupil Assignment Policies and Practices*

The Denver School District has never maintained a system of separate schools for children of different races or a

dual system. 445 F.2d 990, 996; A.P. 126a. The school district has always utilized a neighborhood school policy of assigning children to schools. Under this policy, the school district is divided into geographic subdistricts. A school is provided for each subdistrict generally within ready walking distance for all children in the attendance area (subdistrict). There is a subdistrict for each level of education, elementary, junior high and senior high. Elementary school attendance areas are smaller than the upper levels to accommodate the younger children and limit walking distances to school, generally no more than one mile. Junior high school attendance areas are generally limited to a two-mile walking distance. Senior high school subdistricts are much larger and rely on various forms of transportation to and from school such as public transit, private automobiles and bicycles. Oberholtzer, A. 1308a.

The school district has never assigned pupils to its schools on the basis of race or other individual characteristic except that children with extreme physical handicaps are transported to a special school at district expense, some children with learning disabilities are assigned to special education classes outside the subdistricts where such classes are not provided at their neighborhood schools, and in recent years, a Voluntary Open Enrollment or majority to minority transfer policy has permitted transfers from the neighborhood school to another school on the basis of race or ethnicity where such transfers improve integration at both the sending and receiving schools.

The district court found:

> "It is to be emphasized here that the Board has not refused to admit any student at any time because of racial or ethnic origin. It simply requires everyone to go to his neighborhood school unless

it is necessary to bus him to relieve overcrowding." 313 F.Supp. 73 A.P. 67a.

The school district never took into account race or ethnicity as a factor in establishing school subdistrict boundaries until 1964. Oberholtzer, A. 1370a.

Benefits of the neighborhood school concept include a rational distribution of school population, convenience to the child in getting to and from school, a close home and school relationship with parents and teachers and placement of pupils in relation to maximum use of school plants. PX 20, p. A-2, A. 2008a.

The neighborhood school policy has had some exceptions in its application based on necessity but non-discriminatory. These include transportation of children in newly annexed areas, where there are no schools, to the nearest schools with space available at the required grade levels. Other variations of the neighborhood school policy have included optional attendance areas, eliminated in 1964; individual transfers for a limited number of purely personal non-racial reasons; transportation out to relieve overcrowding; and Voluntary Open Enrollment.

In 1962, concern developed over a proposal to construct a new junior high school on the northern portion of a large site in northeast Denver at East 32nd Avenue and Colorado Boulevard, purchased for that purpose in 1949 when the neighborhood was predominantly Anglo. Many in the community were of the opinion that the rapidly changing racial composition of the area would cause the new school to be predominantly Negro if built. The School Board deferred action on the proposal and appointed A Special Study Committee (sometimes referred to as "Voorhees Committee") to study the question and report generally on the status of educational opportunity in the Denver Public Schools. The

committee was composed of representatives of the varied racial, ethnic, cultural and economic groups which form the total Denver community. PX 20, p. 10, A. 2006a. After an exhaustive study, the committee made a written report to the Board with recommendations on March 1, 1964. PX 20, A. 1997a.

In that report the committee generally endorsed the application of the neighborhood school concept in the organization of the Denver school system (PX 20, p. A-1, A. 2008a), recommended that the Board formalize into a written policy the criteria theretofore utilized in establishing school boundaries and locating new schools (PX 20, p. A-6), and recommended that the Board continue the neighborhood school principle except that it should establish a limited open enrollment plan. PX 20, p. A-10, A. 2011a. The committee also recommended that a matter to be considered with all other factors was that school boundaries and the location of new schools should be determined so that the school neighborhoods will represent, to the extent possible, a heterogeneous school community. PX 20, pp. A-6 and A-7. Such a policy was promptly adopted by the Board on May 6, 1964. PX 1, Policy No. 5100, A. 1989a.

As to optional attendance areas, the committee found that they often were continued after the reasons for their establishment ceased to exist and were no longer necessary to a rational boundary system, and therefore recommended that they be abolished. PX 20, p. A-13, A. 2013a. The remaining few were abolished by the Board shortly after receipt of the committee's report in 1964. The racial effects of optional areas were insignificant and there were no findings that optional areas or their abandonment in any way caused racially concentrated schools.

The committee also reviewed the school district's transportation policies and concluded that while transportation is

sometimes necessary, it is never desirable and that transportation of pupils for the sole purpose of integrating school populations was regarded by the committee as impractical. It was recommended that transportation should be regarded as an expedient rather than a solution to problems including the problem of racial imbalance in the schools. PX 20, p. 11 and 12, A. 2011a and 2012a.

The transportation of pupils from newly annexed areas, where there were no schools, to the nearest available space at the appropriate grade level involved approximately 1000 pupils in 1964. PX 20, p. A-11, A. 2011a. Petitioners complained that these children, who were predominantly Anglo, were not transported to available space in minority schools. The great majority of these children lived in the southwest and southeast areas of Denver where there was space available in schools near their homes. Basically, the petitioners' complaint was that these children were not bused additional miles to integrate minority schools and not that the school district used such transportation as a device to maintain "segregation."

> The Court: Are you maintaining here that the transportation is used to maintain segregation, that transportation is employed in order to avoid integration?
> Mr. Greiner: The latter, yes, Your Honor, that certain students are bused past schools with space in them to schools further distant. A. 769a.

The evidence was not as counsel stated. The evidence was that *minority* students from Smith School who were transported out to relieve overcrowding were bused past some Anglo schools to other Anglo schools. Bardwell, A. 770a.

This type of busing — to relieve overcrowding — was different from the type of busing employed to trans-

port children from areas which had no schools until such time as schools could be built. Petitioners do not complain about busing to relieve overcrowding. The example cited on page 26 of their brief — transporting a small number of pupils from Montbello to Lake Junior High instead of to Cole Junior High which was closer in terms of miles but not on the Interstate highway route utilized—was evaluated by the Court in considering the effect of Resolution 1524 on Cole Junior High School.

> "The purpose of this change [reduction of the pupil membership by 275 students] was to decrease the pupil-teacher ratio at Cole and to make room for a number of special programs to be instituted there. This was also a good faith effort by the Board to improve the quality of education at predominantly Negro Cole." 313 F.Supp. 67 A.P. 54a.

Having determined on educational grounds to reduce the membership at Cole, it would have been inconsistent for the school district to bus additional children into Cole at the same time. School capacity as explained numerous times in the testimony was related directly to the type of educational program conducted at the school and was not simply the product of number of classrooms times 30, the average pupil-teacher ratio for the district, as petitioners assumed.

The district court made no findings that the use of transportation as an adjunct to the neighborhood school policy in any way contributed to or caused "segregation" in any of the schools.

Regarding individual pupil transfers between schools, the Special Study Committee stated that there was every evidence that the rules governing such transfers have been followed carefully and without prejudice. These were extreme-

ly small in number (during 1963, 122 at the elementary level and 29 at the junior and senior high level. PX 20, A-9) and thus were insignificant in relation to the issues in this case.

The Limited Open Enrollment program (LOE) recommended by the Special Study Committee was instituted in 1964. LOE did not employ racial criteria. It simply permitted a student to transfer from his assigned school to any other school in the system where space was available in his grade level on a first come, first served basis. No transportation was provided by the School District. Petitioners state in their brief (p. 32) that LOE involved only 267 elementary students and had a negligible effect on integration.

LOE was instituted to enable minority children who desired an integrated school environment the opportunity to obtain it. To further improve integration, LOE was replaced in the fall of 1968 with a majority to minority transfer policy based on race, with transportation provided by the school district. This program was called Voluntary Open Enrollment (VOE). It was not expected that VOE would racially balance the entire school system although it had that potential. Koeppe, A. 432a. It was designed to give students an opportunity to attend another school where their race was in the minority and at the same time, to improve the racial balance of both the sending and receiving schools. Perrill, A. 1082a, Koeppe, A. 428a.

The VOE principle was incorporated into the Hallett Elementary School Voluntary Exchange Program and was intended to integrate Hallett. Koeppe, A. 425a. As petitioners note in their brief at page 33, the program reduced the Negro percentage at Hallett from 84% Negro to 58.4% Negro during the pendency of this litigation in the summer of 1969, despite the disruptive effects of this litigation. The Hallett plan was contained in Resolution 1531 and also in

its replacement, Resolution 1533. PX 6a, A. 2111a. In addition, the district-wide VOE policy was reaffirmed on June 9, 1969, and the Superintendent was ordered to initiate concentrated and effective plans and programs to accomplish, through voluntary transfers, the results intended by Resolutions 1520 and 1524. PX 6, A. 2110a and Koeppe, A. 433a.

C. Measures Utilized by the School District to Relieve Overcrowding

During the period in question, the school district was obliged not only to provide school facilities for children in newly annexed areas and newly developed areas within the city, but it was faced with increasing school population within some of the existing subdistricts and particularly, the Park Hill area. School buildings in these subdistricts had been adequate to house the children residing therein until the postwar population explosion.

The problem was particularly acute in northeast Denver which was experiencing an influx of young Negro families on the average about one-fourth larger than the white families they displaced. As pointed out by petitioners' witness Bardwell in his 1966 study of the area, the impact on school population was severe. PX 38, p. 23, A. 2116a.

Several means of handling this overcrowding were employed by the school district: permanent construction, temporary buildings or mobile units, boundary changes where adjacent subdistricts were less crowded, double sessions and busing out to nonadjacent subdistricts where space was available.

Permanent construction was preferred. Former Superintendent Oberholtzer testified: "Now, our ideal was to provide permanent construction wherever possible. We had the

usual problems of insufficient funds to do all the things that we wanted to, to meet the needs. A great many of the needs were met through the three bond issues and the other program that I referred to, but a lot of them were not met." A. 1333a.

(1) *Construction of New Schools.*

School District No. 1 spent more than 100 million dollars on school construction from 1947 to 1967, involving 100 or more building projects. Oberholtzer, A. 1304a.

Petitioners complain of only two new schools. The first was not the creation of a new school to relieve overcrowding, but was simply the replacement of the old Manual High School building which had been constructed sometime prior to 1900, and was the oldest high school in the city. Planning and the decision to build the replacement facility were made some years prior to 1951. The new building was constructed on lots immediately adjacent to the old building and opened in 1953. The old building was then razed and the site was used for athletic fields and playgrounds for the new school. PX 356, p. 19. Attendance boundaries for the new building were not changed and remained the same as for the old building and the district court so found. 313 F.Supp. 69-70, A. 59a. In 1950, Manual High School was 27.7% Negro. In 1953, when new Manual opened, the Negro enrollment was 35%. PX 401.

Petitioners' statements to the effect that new Manual was designed to serve the minority community imply that it was planned for a discriminatory purpose. This ignores the fact that the existing school building was simply replaced by the new structure and the area served was exactly the same as the area served by the old building. Former Superintendent Oberholtzer testified that race and color were simply not

considered in the school district's decision making. Oberholtzer, A. 1316a.

The district court commented on this testimony.

> "Former Superintendent Oberholtzer testified at great length to the fact that the administration, including the Board, followed a policy of strict neutrality as far as segregation or integration was concerned. Indeed, Superintendent Oberholtzer stated that even after the decision in *Brown v. Board of Education, supra,* he was of the opinion that it was not permissible for him to classify Negroes as such, even for the purpose of bringing about integration." 313 F.Supp. 73. A. P. 66a.

The court found:

> "Quite apart from the cause element which will be discussed further below, it cannot be said that the acts were clearly racially motivated. One would have to labor hard in order to come up with this conclusion.
>
> "It can, however, be concluded that the segregation (or racial concentration) which presently exists at Manual is not *de jure*." 313 F.Supp. 75, A.P. 71a.

As the court had earlier pointed out, "The impact of the housing patterns and neighborhood population movement stand out as the actual culprits." 311 F.Supp. 75, A.P.71a.

The other new school of which petitioners complain is Barrett Elementary School located at East 29th Avenue and Jackson Street and constructed in the late 1950's for the purpose of relieving extreme overcrowding at neighboring schools then serving the area.

The district court, after the preliminary injunction hearing, held that Barrett Elementary School was built in the late 1950's for the purpose of serving a residential area which was destined in a short time to become populated by Negro families. When the school was completed and opened, its population was predominantly Negro. 303 F.Supp. 282, A.P. 5a. This had come about, the court found, by reason of the Negro migration from the core city area to the east, first to Colorado Boulevard and later beyond, which "caused these areas to become substantially Negro and segregated." 303 F.Supp. 282, A.P. 4.

The court further found fault with the school district for failing to build Barrett larger and not extending its boundaries further east across Colorado Boulevard, a six-lane highway, to encompass the westerly portion of the Stedman Elementary School and relieve its overcrowding, and at the same time obtain some white students in order to integrate Barrett. 303 F.Supp. 290, A.P. 22a.

Yet the principal of Stedman from 1958 to 1963 testified at the trial on the merits that she resided in the 2900 block of Albion Street in 1960 (one block east of Colorado Boulevard and directly east of Barrett School), that there were more Negro families than white families living in the two block area immediately east of Colorado Boulevard; and that the children from that area were attending Stedman Elementary School, which was also receiving children bused from the Hallett area immediately to the east of Stedman. McLaughlin, A. 1135a.

Thus, extending the Barrett boundaries to the east of Colorado Boulevard would have exposed the children to the hazards of a busy six-lane highway without accomplishing any of the salutary purposes assumed by the district judge.

Further, as the district judge found, the school district did not segregate the children in the area served by

Barrett. The migration had done that. The school district simply provided a neighborhood school building for the children who were already there. The only alternatives were to build an addition to Harrington School to the north, as some in the community had suggested,[34] or increase busing out on a permanent basis to whatever schools had space available from time to time.[35] Busing out was not only against the wishes of most parents but also contrary to school policy at the time. The essence of the district court's findings as to Barrett is that the school district, although it had no responsibility whatever for the racial concentration in the Barrett area, violated the Constitution when it did exactly what it did in other areas of the city, built schools where the children were.[36]

The district court commented on the school district's evidence:

> "At trial (on the merits) Defendants attempted to justify Barrett on the ground that until 1964 the Board maintained a racially neutral policy. Racial and ethnic data were not maintained by the District, and race was not considered as a factor in any decision. Defendants further stated that (1) the Barrett site had been owned by the District since 1949 and a school was needed in that general vicinity; (2) Colorado Boulevard was established as the eastern boundary of the Barrett attendance zone because it was a six-lane highway and would have been a safety hazard were

[34]DX GC. Harrington would have had a racial composition similar to Barrett and by 1963, was 81.1% Negro. PX 243, A. 2054a.

[35]All the elementary schools to the east of Colorado Boulevard were overcrowded less than two years after Barrett had opened. McLaughlin, A. 1130a.

[36]Denison School, in southwest Denver was built at the same time from the same plans as Barrett for the same reason—to house children. Oberholtzer, A. 1343a.

children required to cross it; and (3) Barrett was built relatively small because its main function was to relieve overcrowding in existing schools rather than to accommodate any significant projected increase in area population." 313 F.Supp. 64, A. P. 48a.

The court then held that these factors failed to provide a basis for inferring that a justifiably rational purpose existed for Barrett. First, it held that the District owned other sites east of Colorado Boulevard. The court misunderstood the evidence on this point. The evidence was that the school district owned two sites east of Colorado Boulevard in 1952, eight years before Barrett was built. One had already been used for Smith School in 1955 and the other was five blocks north of Stedman and eight blocks east of Colorado Boulevard, completely away from the residential area to be served and too close to Stedman. Oberholtzer, A. 1346a and A. 1442a.

Second, the court stated there were other school sites on both sides of busy thoroughfares indicating that safety was not a primary factor. Of twelve elementary schools near Colorado Boulevard, two have boundaries crossing it. DX HL. One was built in 1920 and the other in 1930 before traffic was a substantial hazard. One now utilizes an elevated crossing, built after two pupils were killed while crossing Colorado Boulevard. Armstrong, A. 1281a.

Third, the court would have had Barrett relieve overcrowding east of Colorado Boulevard as well as west of Colorado Boulevard. Overcrowding east of Colorado Boulevard was indeed to become a major problem later because of the influx of new families with more school age children. PX 38, p. 23, A. 2116a. It would have required an elementary school of enormous size to solve this problem and if it had been built by the school district, petitioners un-

doubtedly would have complained that it was intended to capture Negro students east of Colorado Boulevard.

The decision to build Barrett was made in 1958 before the 1960 federal census which was used by petitioners to show that the school district should have known that Barrett would have opened with a predominantly Negro school population. PX 41, A. 2022a. That census did show that in 1960 the southern portion of the Barrett attendance area was 73% Negro and that the northern portion was 51% Negro. But the 1960 census was not available to the school district until some time *after* Barrett opened. Had the school district been basing its decisions on racial factors, which it was not, (Oberholtzer, A. 1346a) the 1950 census showed that the area was only 5.6% Negro at that time. PX 38, Table 3, p. 6, A. 2116a.

Speaking of the 1956 Manual boundary change, the district court found that extension of the mandatory Manual attendance area to Colorado Boulevard at that time would have resulted in the inclusion of a *predominantly Anglo* neighborhood. 313 F.Supp. 70, A.P. 61a. Yet it concluded that the school district should have known that the area was *predominantly Negro* just two years later when the decision to build Barrett was made.

(2) *Construction of Additions to Existing Schools.* Between 1940 and 1964, the school district constructed 39 new school buildings, 5 replacement buildings and 46 additions to existing buildings (some were additions to buildings also constructed during that time). PX 20, p. B5. These additions were evenly distributed throughout the city. Of the 36 additions constructed between 1940 and 1960, 18 were constructed east of Broadway, the main north-south thoroughfare near the center of the city and 18 were constructed west of Broadway. Sixteen were constructed north of Colfax Avenue, the main east-west thoroughfare slightly

to the north of the geographical center of the city, and 20 were constructed south of Colfax Avenue. PX 20, App. No. 2. Thus each of the four quadrants of the city contained 9 additions.

Petitioners made no complaint about the construction of additions to existing schools except the addition at Hallett. The district court found that this increased the school's capacity to absorb the influx of Negro population into the area. 303 F.Supp. 293, A. P. 29a. The court did not suggest what other measures to deal with overcrowding would have been acceptable and did not find that this measure caused the racial concentration in the Hallett subdistrict.

(3) *Mobile Units.* Mobile units, or more properly, self-contained classrooms, installed on concrete foundations with air-conditioning and toilet facilities, were erected as a temporary measure at some schools when permanent construction was not feasible and after other measures to relieve overcrowding had been considered. Oberholtzer, A. 1333a. Petitioners complained of the use of mobile units in northeast Denver to accommodate the large migration of students into that area in the 1960's. However, the Special Study Committee approved their use as a temporary measure to relieve overcrowding PX 20, B-10. The district court found that, as to Stedman and Hallett, this measure to relieve overcrowding did just that and that it provided more room for students moving into these school subdistricts. 303 F.Supp. 291, 293, A. P. 25a, 29a. There was no finding that the use of mobile units caused the Negro concentrations within the subdistricts or that other measures should have been used to relieve the overcrowding within such subdistricts. Four mobile units were placed at Stedman in 1965 and four mobile units were placed at Hallett between May of 1964 and May of 1965. Boundary changes to adjust for crowding had already been used. Busing out of Stedman

had to be employed in 1966 as an alternative to double sessions. Burch, A. 972a, Oberholtzer, A. 1350a. At Smith Elementary School, adjacent to and northeast of Stedman, also predominantly Negro, some 12 mobile units were used because the parents preferred them to busing out (A. 106a and A. 1337a), and the court made no findings whatever with regard to mobile units at Smith.

(4) *Subdistrict Boundary Changes.* During the years in question, a great number of minor subdistrict boundaries were changed by the school district throughout the city as a means of adjusting for pupil population changes. For example, in 1962, subdistrict boundary changes were made by the administration involving some 32 schools at the elementary level (DX BD, Hedley A. 855a), and the same year, some 18 boundary changes were being considered at the junior high level. PX 405, Johnson, A. 951a. Junior and senior high school boundary changes were made by the Board of Education. By Board by-law, the superintendent had power to change elementary school boundaries.

A number of the school district's witnesses, including former board members and its former superintendent, testified that racial and ethnic characteristics were never considered by them as a factor in their decision making for any purpose until 1964. Johnson, A. 899a, Burch, A. 968a, Oberholtzer, A. 1371a. This fact was noted by the district court in its opinion following trial on the merits which found that the boundary changes of the core city schools were neither "willful or malicious actions of the Board or the administration." 313 F.Supp. 73, A.P. 66a.

Of the numerous school subdistrict boundary changes made by the school district over the years since World War II, petitioners complained of the few treated by the district court in its opinions. In every case, the boundary changes in question were minor and were made in response to a need to

adjust numbers of children because of overcrowding in some schools. Unnecessary boundary changes were not made because of the educational disruption caused to the children involved. McLaughlin, A. 1138a.

a. *Columbine Elementary School.* In 1946, Columbine, located north of City Park and east of York Street, had an enrollment of 510 pupils, 39 of whom were Negro. PX 336, A. 2081a. In 1950, Columbine School was overcrowded and on double sessions (PX 406a, A. 991a) and in 1951, its Negro enrollment was 24%. A.P. 65a. In 1952, three optional zones were established around Columbine—Columbine-Harrington, Columbine-Mitchell, and Columbine-Stedman—for the purpose of relieving overcrowding at Columbine and they did have the effect of decreasing the overcrowding at Columbine so that double sessions could be eliminated. 313 F.Supp. 75, A.P. 72a. The district court found no actions based on racial considerations, no willful or malicious actions on the part of the board or the administration, and no segregative effect. 313 F.Supp. 73, 75; A.P. 66a, 67a, 72a.

b. *1956 Secondary School Boundary Changes.* In 1956, a new junior high school, Hill, opened in the eastern part of the city to house the large increase in the area's pupil population occasioned by new residential construction and annexations to the city. Establishment of boundaries for the new junior high school caused a domino effect in changing boundaries for all other junior high schools in the area, Smiley, Gove, Morey and Cole. As a result, high school boundaries between Manual and East high schools also required adjustment because of changes in their feeder junior high schools. Oberholtzer, A. 1314a. There was objection to the high school changes and Cole-Smiley changes by some in the minority community primarily because they felt that these changes should have been more extensive to obtain a

better racial mix at Cole and Manual. The district court held that the effect of these actions, on the minority concentrations at Cole and Manual is not known and that "the instant situation then cannot be placed at the administration doorstep." 313 F.Supp. 75, A.P. 72a.

c. *1962 Elementary School Boundary Changes.* In 1962, minor boundary changes were proposed involving more than 30 elementary schools. McLaughlin, A. 1138a. One of these was Boulevard Elementary School located west of the South Platte River in the northwest quadrant of Denver. The change there was made necessary by the decision to raze the older portion of Boulevard School and the resulting reduction of the capacity of the school. The district court held that there was absolutely no evidence presented, other than the fact of the boundary change, upon which to base a finding that the school district was motivated by an intent to segregate Hispano students at Boulevard but did find that the boundary change was necessitated by the legitimate need to reduce pupil enrollment. 313 F.Supp. 75, A.P. 73a.

There was no evidence whatever as to any boundary change involving any other predominantly Hispano school.

Stedman Elementary School located just east of Colorado Boulevard in Park Hill was another of the more than 30 schools involved in the proposed 1962 boundary changes. The administration proposed that some minor changes be made in the Stedman subdistrict, (PX 53, A. 2026a) but after a meeting and discussion with the principals involved the suggested changes were not made. The district court found after preliminary hearing that the refusal to change these boundaries confined Negro students in Stedman (50-65% Negro) and denied them the opportunity to attend an integrated school at Hallett (85-95% Anglo) immediately

to the east of Stedman. In the next finding, the court held that Hallett would gradually become predominantly Negro. 303 F.Supp. 293, A.P. 28a, 29a. The court of appeals held that "The Board's refusal to alter the Stedman attendance area in 1962 was not an affirmative act which equates with de jure segregation." 445 F.2d 1001, A.P. 136a.

The administration did make a proposed minor change from Hallett to Philips by making the optional area between the two schools a part of the Philips mandatory attendance area. The district court made two assumptions: (1) that the children who lived in the area were 100% Anglo and (2) that *all* the children in that optional area had opted to attend Hallett in the 1961-62 school year. Neither of these two assumptions was supported by the evidence. There is no evidence to indicate how many of the children in the former optional area had opted for Philips in previous years. The district court commented on the result: "All that was accomplished was the moving of Anglo students from a school district which would gradually become predominantly Negro [but was then predominantly Anglo] to one which has remained predominantly Anglo." 303 F.Supp. 293, A.P. 29a. There was no finding that this change caused Hallett to become predominantly Negro or that it was racially motivated. In fact, Hallett remained predominantly Anglo for two years after the change. PX 243, A. 2054a.

d. *1962 Junior High School Boundary Changes.* In 1962, 18 separate boundary changes were proposed at the junior high school level. PX 405, p. 22. It was alleged that the elimination of optional areas and changes involving Cole, Morey and Byers located from north to south in the geographic center of the city were racially motivated. The district court found:

"The removal of the Morey Junior High optional zones in 1962 did have the effect of increasing the concentration of minority students at that school. It also had the salutary effect of relieving the concentration of Negro students at Cole, a result consistent with defendants' claim that it was carrying out a racially neutral policy. Both the desirable and undesirable consequences of the 1962 changes appear to have been by-products of a general redistribution. In view of that, it would strain both the facts and the law to say that the administration acted with an unlawful purpose or design in this instance." 313 F.Supp. 76, A.P. 73a.

e. *1964 Boundary Changes.* Twenty-one minor boundary changes were made at the elementary level in 1964. Hedley, A. 857a. Petitioners contended that the boundary changes affecting four elementary schools in Park Hill resulted in "segregation" at two of the schools, Stedman and Hallett.

These boundary changes included one from Stedman to Hallett and another making the Stedman-Park Hill optional area mandatory to Park Hill which was proposed by the administration in 1962 but not made until 1964. PX 71, A. 2030a. They also included changes from Park Hill to Philips and Hallett to Philips. The size of the areas changed could not have made a significant difference in the enrollment in any school. If anything, the changes should have reduced the enrollment at Stedman. Yet whatever reductions were made were more than offset by the influx of pupils into the Stedman district. The total enrollment increased from 796 in 1963 to 838 in 1964. Anglos decreased by 52 and Negros increased by 99. The following table made from plaintiffs' Exhibit 242 (A. 2052a) shows the enrollment by race in all four schools in 1963 before the changes and in

1964 after the changes. Considering all four schools, Anglos decreased by 201, Negroes increased by 357, and Hispanos increased by 29. None of these changes could be attributed to boundary changes among these four schools.

	1963				1964			
	A	N	H	Total	A	N	H	Total
Stedman	127	611	58	796	75	710	53	838
Hallett	417	183	28	628	239	296	42	577
Park Hill	779	10	4	793	745	63	16	824
Phillips	486	4	9	499	539	96	17	652
	1809	808	99	2716	1598	1165	128	2891

The district court found that the change in the Stedman optional area removed the option open to "many" Anglos residing in the optional area to attend Stedman. 303 F.Supp. 291, A.P. 25a. In view of the undisputed fact that Park Hill not only failed to gain Anglos after the change but lost 34 and gained 53 Negroes, this finding is clearly erroneous. The court also found that the predominantly "white" portion of Stedman was detached to Hallett. 303F.Supp. 291, A.P. 24a. As shown in the table above, Stedman lost only 52 Anglos and 5 Hispanos from *all* causes. If there were any whites at all in the area transferred to Hallett, there were only a handful.

The change from Hallett to Philips involved some 70 pupils of whom approximately 50 were Negro. McLaughlin, A. 1141a. The table above shows that the Negro enrollment at Philips increased from 4 to 96 for a gain of 92 Negroes.

(5) *Double Sessions.* Extended days and double sessions were other measures used by the school district temporarily to relieve overcrowding resulting from increased pupil population. Double sessions were used in preference to constructing temporary buildings. At times, the school district had as high as 200 classrooms on double sessions. Oberholtzer, A. 1333a. There was no evidence of the use of double sessions for containment and no findings of such.

(6) *Transportation Out to Relieve Overcrowding.* Transportation of children out of overcrowded school subdistricts was utilized by the school district as a temporary solution to overcrowding when other means of relieving overcrowding were not available. At times parents were given a choice of measures to relieve overcrowding. In 1966, Stedman parents preferred busing out to predominantly Anglo schools over double sessions. At the same time, Smith parents chose mobile units instead of busing out. Oberholtzer, A. 1337a, Burch, A. 972a.

D. *School District Policies Regarding Racial Imbalance.*

Until 1962, the school district followed a policy of strict racial neutrality. Its administration and Board members were of the opinion that the provisions of the Colorado Constitution would not permit them to classify pupils by race for any purpose. 313 F.Supp. 73, A.P. 66a.

In 1962, the administration proposed to construct a new junior high school in northeast Denver. Protests from the community, both majority and minority, caused it to postpone the decision and refer the broad question of what to do about growing concentrations of racial and ethnic minorities in the Denver Public Schools to a special study committee (the Voorhees Committee). A. 2005a. This decision marked the beginning of a change in official policy from that of strict racial neutrality to that of a conscious racial awareness. Oberholtzer, A. 1319a.

Also, in 1962, the Board created the Office of School-Community Relations on the recommendation of the Superintendent. Oberholtzer, A. 1351a. That office then compiled the first comprehensive racial survey of students and teachers since 1946.

In March of 1964, the report of the Special Study Committee was received (PX 20) and in April of 1964 the Su-

perintendent made a summary of the 155 recommendations and distributed it to every member of the school administrative staff. Oberholtzer, A. 1323a.

Action was taken on a large number of the recommendations over the following two-year period. Optional attendance areas were discontinued; racial and ethnic characteristics of school population were added to the criteria for setting subdistrict boundaries; experimental low cost lunch programs were set up in low income areas; an industrial arts facility was added to Smiley Junior High School (a resolution school); social studies programs to promote cultural understanding were added; teachers were given special training in human relations concepts; books dealing with intergroup relations were added to school libraries; special federally-funded educational programs including Headstart, team teaching of language, reading and arithmetic were established in core city schools; a Metropolitan Youth Education Center was established to provide basic educational training to unemployed youths; counselling time was doubled in core city secondary scools; recruitment of well-qualified minority group teachers was intensified and they were assigned to nearly all schools of the district; a community study hall program was instituted in northeast Denver; and various other actions were taken to implement the recommendations of the Special Study Committee. DX H.O. and H.P., Oberholtzer, A. 1382a-1388a.

On May 6, 1964, the Board of Education adopted Denver Public Schools Policy 5100 (PX 1, A. 1989a) which provided in pertinent part:

> "The continuation of neighborhood schools has resulted in the concentration of some minority racial and ethnic groups in some schools. Reduction of such concentrations and the establishment of

more heterogeneous or diverse groups in schools is desirable to achieve equality of educational opportunity. This does not mean the abandonment of the neighborhood school principle, but rather the incorporation of changes or adaptations which result in a more diverse or heterogeneous racial and ethnic school population, both for pupils and for school employees." PX 1, A. 1989a, A. 1990a.

At the same time, the Board eliminated the optional attendance area between Cole and Smiley Junior High Schools, a predominantly Negro area, and assigned that area on a mandatory basis to Gove Junior High School, a predominantly Anglo school further to the south. This was the first time that the Board endeavored to take into account racial and ethnic factors pursuant to Policy 5100, and the result was integrative. Oberholtzer, A. 1375a.[27]

At the same meeting, the Board, in eliminating optional attendance areas between high schools, assigned a predominantly Negro optional area between Manual High School and East High School to predominantly Anglo East High

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[27]As a result of the 1964 boundary changes, a suit was instituted on May 14, 1964, against the Superintendent, the Board of Education and the School District by a white parent alleging that his children, who attended Park Hill Elementary School and Smiley Junior High School, would be affected by the boundary changes and that the changes were made

> ". . . with distinctions and classifications of pupils made on account of race or color, all in contravention of Article IX, Section 8, of the Constitution of the State of Colorado, which prohibits any distinction or classification of pupils on account of race or color."
>
> "4. That said boundaries were established for the express purpose of 'racial balancing' and with racial distinctions in mind."
>
> * * *
>
> "6. That said defendants at the same meeting on May 6,

School. Oberholtzer, A. 1376a. An area on the easterly edge of the city in the path of the Negro migration was assigned from East to almost totally Anglo George Washington High School. Oberholtzer, A. 1377a. Both actions were taken with the intention of changing the racial-ethnic factors to the extent feasible in accordance with Policy 5100. Oberholtzer, A. 1378a.

Also, in May of 1964, the Board adopted the limited open enrollment policy (LOE) recommended by the Special Study Committee. Oberholtzer, A. 1369a, A. 1978a.

On March 17, 1966, the Board appointed the Advisory Council on Equality of Educational Opportunity which considered the question of whether the school district's neighborhood school policy (as defined in Board Policy 1222C dealing with criteria for establishing or changing school subdistrict boundaries) should be applied to the location of new schools and additions to schools in northeast Denver. Oberholtzer, A. 1380, 1381a.

The Council submitted its final report and recommendations dated February, 1967 (PX 21) in which it recommended that no new schools should be built in northeast

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1964, adopted a 'Statement of General Policy' relating to the establishment of school attendance boundaries and the factors to be considered in their establishment, which Statement contained the following factor for consideration:

'(f) The ethnic and racial characteristics of the school population—making, to the extent possible, a heterogeneous school community.'

which Statement, together with the school boundaries as enacted, are annexed hereto as Exhibits A and B and by this reference incorporated herein.

"7. That the Board and the Superintendent have exceeded their jurisdiction and abused their discretion in enacting and approving said boundaries."

The suit was eventually dismissed on motion of the School District on July 31, 1964. *Willis v. Burch, et al.*, Civil Action No. B-71888, in the District Court in and for the City and County of Denver and State of Colorado. No appeal was taken.

Denver until plans were developed to implement the previously adopted policies of the school district to consider racial and ethnic characteristics in order to obtain more heterogeneous school communities. The Council also recommended a school capacity study, a cultural arts center, a superior school program, educational centers and continuation of the advisory council. All of these recommendations were implemented except the educational centers and continuation of the council. DX H.Q. Oberholtzer, A. 1389a.

As a result of the decision not to build new schools in northeast Denver and the pressing need for additional capacity at the junior high school level dating back to the proposal to build a new junior high school at East 32nd Avenue and Colorado Boulevard in 1962, the Board authorized the construction of Hamilton Junior High School in southeast Denver to be utilized to relieve overcrowding at Smiley Junior High School in northeast Denver. This permitted the transfer of minority pupils out of the Smiley area to Hamilton. Later similar transfers were made to another new junior high school (Place) in southeast Denver. Noel, A. 98a, 103a and 104a.

In 1967, the Board proposed a bond issue to finance construction of needed capital improvements in all parts of the city. The proposal provided for the establishment of middle schools to accommodate pupils in grades 4, 5 and 6 which would serve areas larger than the traditional elementary schools. The middle schools proposed would have been located in or near northcentral and northeast Denver and would have contained more heterogeneous school populations than existing elementary schools. PX 24, pp. 1-15. The bond proposal was defeated at a special bond election that fall.

In May of 1968, the Board passed Resolution 1490 (PX 2, A. 1991a) which was designed to further implement Pol-

icy No. 5100. PX 1, 1989a. Resolution 1490 provides in pertinent part:

> "Therefore, in order to implement Policy 5100, the Board of Education hereby directs the Superintendent to submit to the Board of Education as soon as possible, but no later than September 30, 1968, a comprehensive plan for the integration of the Denver Public Schools. Such a plan then to be considered by the Board, the Staff and the community and, with such refinements as may be required, shall be considered for adoption no later than December 31, 1968."

Pursuant to Resolution 1490, the then Superintendent (Dr. Robert D. Gilberts, who had succeeded Dr. Oberholtzer upon his retirement in 1967) with the aid of educational consultants, prepared his report entitled "Planning Quality Education" (DX D, A. 2128a) which he submitted to the Board in October of 1968. Basic to the proposals contained in the plan was the consideration that integration alone did not assure quality education and there was a need for intensified educational programs for children of all races who come from deprived environments to overcome the limitations imposed by their backgrounds. DX D, p. 6, A. 2133a.

The Superintendent's plan embodied, as its key feature, a Model-School Complex which involved a grouping of several schools into one administrative unit, preserving the neighborhood school as the basic unit in accordance with Policy 5100, but providing maximum social and racial integration through special programs in the larger area comprising the cluster. Other features included continued transportation of minority students out of overcrowded schools to majority Anglo schools, the Voluntary Open Enrollment Plan (VOE) embodying the principle of majority to minor-

ity transfers with transportation provided, and innovative educational programs. DX D, pp. 6, 7, A. 2134, A. 2135a.

In November of 1968, the Board adopted the VOE program to become effective at the beginning of the second semester of that school year in January of 1969, at which time approximately 850 students were transferred under the plan. Koeppe, A. 428a.

Despite limited applicability of VOE due to the mandatory injunctive orders of the district court, 1,648 students obtained transfers under VOE during the first semester of the 1969-1970 school year. Of those, 408 were Anglo, 94 were Hispano and 1,146 were Negro, (DX VA, p. 51, A. 2161a) or approximately 8.2% of all Negro students enrolled in all of the Denver Public Schools in 1969. DX S-1, A. 2166a.

Also, in November of 1968, the Superintendent commenced planning one element of his program for quality education, the "stabilization" of schools in northeast Denver. Gilberts, A. 228a. This included improving the percentage composition of Philips and Park Hill Elementary Schools and East High School (all predominantly Anglo) as well as the reversal of the racial composition of Barrett Elementary School and Smiley Junior High School. Gilberts, A. 229a. As the plans eventually evolved, certain areas were carved out of the attendance areas of these schools and assigned to noncontiguous majority Anglo schools in other parts of the city and children from some predominantly Anglo schools in the city, who were being transported because they lived beyond walking distance from their schools, were diverted and reassigned to these northeast Denver schools. These plans included innovative educational planning and reduction in pupil membership in Cole Junior High School and Stedman Elementary School. They also included a voluntary exchange program to integrate Hallett

Elementary School. The purpose of the entire planning was to attempt to reverse the trend of growing minority concentrations in the schools of northeast Denver and, as a side benefit, to test the hypothesis of whether an integrated setting provides a better educational opportunity for minority children. Gilberts, A. 235a, 313 F.Supp. 95, A.P. 109a. Dr. Gilberts was not convinced that there was a direct relationship between school integration and improved academic achievement. Gilberts, A. 245a.

The plans for the racial stabilization of these northeast Denver schools were embodied in three resolutions passed by the Board between January and April, 1969. Resolution 1520 (PX 3 annexed to Complaint, A. 42a), approved on January 30, 1969, recited that because of housing patterns, East High School and Smiley Junior High School contained growing numbers of racial and ethnic minorities and that reduction of such numbers was desirable as one of the steps to improve educational opportunity in those schools. The Resolution then made a series of boundary changes to accomplish the reduction of minorities at those schools effective as of the opening of school in September, 1969, with transportation provided.

Resolution 1524 (PX 4 annexed to Complaint, A. 49a), approved on March 20, 1969, made additional boundary changes by detaching areas from the Smiley Junior High School area containing approximately 850 students and assigning them to other noncontiguous predominantly Anglo junior high schools with transportation provided. Additionally, portions of the Cole Junior High School attendance area were detached and assigned to other predominantly Anglo junior high schools.

Resolution 1531 (PX 5 annexed to Complaint, A. 60a), passed by the Board on April 25, 1969, contained many of the same recitals as Resolution 1520 and directed the super-

intendent to implement the model-school complex concepts contained in his plan in response to Resolution 1490, by activating elementary school complexes 1 and 2 in September of 1969; made boundary changes affecting Philips, Park Hill and Barrett Elementary Schools; directed the superintendent to implement pre-primary educational programs in northcentral Denver; directed the superintendent to make Hallett Elementary School a demonstration integrated school as of September, 1969, by use of voluntary transfers; continued the transportation of pupils from Stedman Elementary School to permit removal of mobile units; and directed that cooperative plans be developed to group schools in complex 5 (northcentral Denver) with other schools outside the complex.

Some planning was begun during the month of May, 1969, in preparation for the implementation of the three resolutions in September of that year. A school board election was held in May of 1969, and two new members of the Board were elected. A majority of the reconstituted Board rescinded the three resolutions on June 9, 1969, nearly three months before they were to become effective.

At the same meeting, Resolution 1533 (PX 6a, A. 2111a) was passed by the Board. It was designed to replace rescinded Resolution 1531 and contained all of the elements of the rescinded resolution except the mandatory boundary changes. It recited that the Board had rescinded the three resolutions because they were inappropriate to accomplish their intended purposes and lacked community support. Other recitals included consideration of Resolution 1490 and the need to stabilize pupil memberships in certain schools of the district. The Board then found that many of the same steps contained in the previous Resolution 1531 were necessary and appropriate to the improvement of education in the Denver Public Schools and adopted them in Resolution 1533.

Consistent with its policy of voluntary rather than mandatory integrative efforts, the Board also passed a motion at its June 9, 1969, meeting designed to apply that principle vigorously to accomplish the same objectives contained in rescinded Resolutions 1520 and 1524—reversal of the minority racial concentrations at Smiley Junior High School and improvements in the percentage composition at East High School. PX 6, A. 2110a.

Both the mandatory plan and the voluntary plan were formulated on the premise that racial concentrations existed in Denver as a result of housing patterns and not as a result of any action on the part of the school district. Both plans were alternative evolutionary steps in Denver's developing educational policies to provide the best educational opportunities for all the children of Denver. Both were designed to reverse the trend of growing racial minority concentrations in northeast Denver schools as one of the steps to improve the quality of the educational programs in those schools. Only the means were different and the petitioners' major complaint regarding rescission and replacement of the three resolutions was the effectiveness of the replacement. Gilberts, A. 250a—A. 255a.

The Board has continued to pursue its policy of attempting always to improve the quality of education offered to the children of Denver. Following the trial on the merits and the opinion of the district court on March 21, 1970, the Board adopted Resolution 1562 (Appendix II to the Opinion of the Court of Appeals of June 11, 1971, 445 F.2d 1010, A.P. 156a) which reaffirms utilization of Voluntary Open Enrollment (VOE) while at the same time directing that intensified educational efforts be employed to improve the quality of education offered to children at the schools designated by the district court regardless of the final outcome of this litigation.

The court of appeals commented on this resolution in its opinion of June 11, 1971: "The salutary potential of such a program cannot be minimized, and the Board is to be commended for its initiative." 445 F.2d 1005, A.P. 146a.

E. *School District Resources*

(1) *School Facilities.*

In their second cause of action, petitioners alleged that the school facilities serving predominantly minority school populations were old and therefore inferior. The evidence indicates that some of the buildings located in the core city are older, but they are well maintained by an extensive maintenance and improvement program. Armstrong, A. 1284a. Of 39 elementary schools constructed prior to 1921, only four were court-designated schools to be desegregated (PX 24, p. 33), and of these, three had new additions constructed in the 1960's (PX 24, pp. 33-36), and the fourth, Elmwood, is currently being replaced by a new building. Of the three court designated secondary schools, Cole was constructed in 1925, Baker in 1957, and Manual in 1953. PX 24, pp. 52, 54. The district court held, in its opinion of March 21, 1970, that in general terms a disparity in age of buildings and size of sites exists between predominantly minority and predominantly Anglo schools. Based on the evidence of ages of buildings, the disparity favors the court designated schools. The court then found, "However, we do not think that the age of a building and site size are, in and of themselves, substantial factors affecting the educational opportunity offered at a given school." 313 F.Supp. 81, A.P. 83a.

(2) *Teachers.*

a. *Assignment Practices.* At no time, has any school faculty or staff been 100% minority in the Denver schools. With one exception, no school ever had more than 50% mi-

nority teaching staff. The exception was at Barrett School which, for a short period of time, had more Negro than white teachers, there being available several Negro teachers with special skills in the teaching of reading and other subjects, which expertise was needed at that school. Stetzler, A. 1167-9a.

In 1970, Negro teachers were assigned to 70 of the district's 92 elementary schools. Stetzler, A. 1166a. No school had more than 50% minority teachers, two schools had 41 to 50%, two schools had 31 to 40%, five schools had 21 to 30%, and all the rest had fewer than 20%. Of the three court designated secondary schools, Cole had 61% Anglo teachers, Baker had 83.6% Anglo teachers and Manual had 68.6% Anglo teachers. DX S-1, A. 2166a.

Dr. Stetzler testified that for some years it was considered discriminatory to identify teachers or applicants by race, through photographs or even requiring place of birth. Such was a policy of the Colorado Antidiscrimination Commission. A. 1168-9a.

Although the district court made no findings with regard to the racial composition of teachers in its opinion after trial on the merits, the petitioners argued in the court of appeals that the assignment of minority teachers was probative of segregatory intent. The court of appeals held that the Board's teacher assignment practices were not reflective of segregative desires.

> "It operated on the prevailing educational theory of the day, the Negro pupils related more thoroughly with Negro teachers. The rationale was that the image of a successful, well educated Negro at the head of the class provided the best kind of motivation for Negro children and that in turn the Negro teacher had a greater understand-

ing for the Negro pupil's educational and social problems. Although the validity of that theory is under severe attack today, we do not agree that the results of its past application infer segregatory intent. In response to new educational theories, the Denver public school system has today assigned Negro teachers to schools throughout the system and has reduced the percentages of Negro teachers in the predominantly minority schools." 445 F.2d 1007, A.P. 150a.

b. *Experience of Teachers.* There was no finding by the district court that any certain level of experience was superior to any other level or that teachers without prior experience were inferior to older and more experienced teachers. Nor was there any evidence to support such contentions.

All teachers must be licensed by the State of Colorado with a bachelor's degree from a standard institution of higher learning as one of the qualifications. Colorado Revised Statutes 1963, §127-17-14. Thus all Denver schools were assigned teachers with comparable educational backgrounds.

Petitioners' evidence on experience level of the faculty at the core city schools was severely distorted by their use of Denver public school experience only. The more significant evidence was that between 38 and 50% of the new teachers employed by respondents between 1962 and 1968 had prior teaching experience in other school districts. DX DA, A. 2143a. Of those, 18 to 24% had three or more years' prior experience. DX DB, A. 2144a. Further, about 9% of the new teachers hired by respondents had advanced degrees. Stetzler, A. 1156a.

Dr. James S. Coleman was of the opinion that teacher experience and graduate degrees were not important fac-

tors. A. 1557a. The Negro principal at Barrett Elementary School, Mr. William Smith, testified for the petitioners and his evidence included his opinion that new teachers were as capable and competent as those with more experience. A. 1701a. Dr. Stetzler testified that new teachers of the younger generation were better prepared and with greater social awareness than those of even five years earlier. A. 1170a.

The record contains no other significant evidence despite any claim by the petitioners pertaining to teacher inexperience as a cause of or relation to unequal educational opportunity in the core city schools.

c. *Transfers.* The school district's agreement with Denver Classroom Teachers Association, an affiliate of the National Educational Association (NEA), permitted transfers by teachers between schools, on the basis of seniority, within the district. The district court found that this created more vacancies in minority schools which were typically filled by new teachers with little or no Denver Public School experience. 313 F.Supp. 80, A.P. 82a. There was no finding that this resulted in an inferior educational offering at these schools.

(3) *Curricula.* Petitioners alleged in the second count of their second cause of action that the school district allocated inferior resources to predominantly minority schools. One of the items specified was curricula. They produced no evidence of disparate curricula and the court made no findings that curricula was inferior in any school. Dr. Oberholtzer testified that there were differences in curriculum offerings within specific subject areas, depending on the needs of the pupils and their interests, but the basic subjects were taught in all of the schools. A. 1366a.

(4) *Dollar Inputs.* There was abundant evidence that the predominantly minority schools received proportion-

ately *more* of the district's financial resources than predominantly Anglo schools. Petitioners point only to a possibility that the total salaries paid to teachers at minority schools was comparatively less because the district's salary schedule is based partly on experience. But the slight difference in salaries paid based on experience is far outweighed by a lower pupil-teacher ratio at minority schools, teacher aides, expensive compensatory educational programs, newer types of curriculum materials, more community trips, more teacher-developed educational materials, assignment of special reading teachers, and funds in substantial amounts allocated to low-income area schools under federal programs limited to such schools. Oberholtzer, A. 1367a, 1368a. The district court made no findings of unequal allocation of any resources to the core city schools.

F. *Educational Results—Achievement.*

The district court found lower academic achievement in the court designated schools by considering results of standardized achievement tests (1968 Stanford Achievement Tests). The school district had published a report in 1968 containing an alphabetical listing of all schools in the district and the results of the various standardized tests given in each school that year.

The *average* of the median for each test given at a particular school was used by the court as indicative of that school's overall achievement level.

The court then found from this data that children at minority schools achieved at a lower level than the city wide average for all schools (the city wide average was an average of the average median scores for all schools at the same level). 313 F.Supp. 79, A.P. 79a, 80a.

Individual pupil achievement in all schools ranged to highs between the ninty-fifth and the ninty-ninth percentile,

thus demonstrating conclusively that individual students in all minority schools achieve at the highest level shown by the standardized tests. Klite, A. 574, 576a, PX 379, PX 83.

Achievement expectancies at all schools were based on individual IQ tests previously administered. Expectancies were not based on racial or ethnic composition of the schools. School expectancies were then computed based on the individual expectancies of their pupils. PX 83, PX 379, Cavanaugh, A. 650a. In almost all cases achievement test results exceeded expectancies thus established. PX 379.

The finding of comparatively low average achievement was the single most important factor in the court's conclusion that the court-designated schools were inferior.

G. *Remedy*

The district court concluded, following trial on the merits, that "segregation, regardless of its cause, is a major factor in producing inferior scools and unequal educational opportunity." 313 F.Supp. 82, A.P. 86a, 87a. The court then proceeded to a discussion of remedies which included a "program of improvement" for the court-designated schools and a suggestion that the Board guarantee space for minority students who wished to transfer out of the court-designated schools under VOE. 313 F.Supp. 84, 85, A.P. 90a, 93a. The court observed as to the latter:

> "Arguably, at least, this method satisfies the Constitution in that it recognizes the right of every student and makes that right available to him without forcing it on him. Comments of the litigants on this will be considered at a further hearing." 313 F.Supp. 85, A.P. 94a.

At the later hearing on remedies, the Board presented a plan (DX VA, A. 2160a) responsive to the suggestions of

the district court. It contained a specific program for improvement in the quality of education and included VOE with space guaranteed. Through Resolution 1562 (A. 2160a) the Board committed itself to continue improvement in the quality of education offered in its schools regardless of the final outcome of this litigation. In its discussion of remedies, however, the district court discarded the question of whether VOE would satisfy the Constitution and stated that the crucial factual issue was whether compensatory education alone in a segregated setting is capable of bringing about the necessary equalizing effects or whether desegregation and integration are essential. 313 F.Supp. 94, A.P. 107a.

Petitioners' position was that both desegregation *and* massive compensatory education were essential to satisfy the Constitution. Respondents' position was that there was no competent evidence that desegregation or traditional compensatory education had any significant effect on improvement of educational achievement and that solution of the problem required continued experimentation with varied innovative approaches to educational policies until an effective solution was found.

The district court summarized the testimony of the expert witnesses produced by both sides, substantially all of which was designated and appears in Volume 4 of the Joint Appendix.

None of the experts could suggest an unqualified solution to the problem of low achievement of children with low socio-economic family background and attendant cultural disadvantages. The solutions suggested were studied but unproven theories. None of petitioners' experts had studied the Denver school system. They expressed general opinions not addressed to Denver specifically but to every school system

in the country. None of them prescribed a specific solution to Denver's problems.

The testimony of Dr. James Coleman, who supervised the survey reported in the publication entitled "Equality of Educational Opportunity" (PX 500), makes it abundantly clear that the causes of low achievement are socio-economic and are not a matter of race. A. 1546a and A. 1558a.

This conclusion of the experts that the cause of low achievement was not a matter of race but rather a product of the socio-economic status of the students was made so clear that the court remarked in colloquy with Dr. Coleman:

> "The thing that worries me about all this is that what you say is that the schools are not inferior as counsel proved at the trial, but that the students are inferior. They proved it overwhelmingly that the schools were inferior. Now, in coming up with a new tack—it's not the schools at all, it's the students and their economic and cultural deprivation that makes the educational experience one that is non-competitive. It's dull; not exciting. I mean, I get that from what you're saying. Sort of a self-defeating proposition. They proved the Constitution was violated and now they are unproving it." A. 1546a.

Dr. Coleman admitted his survey did not show the effects of racial integration one way or the other because the survey was limited to one point in time and did not purport to be a controlled study of a before and after situation. A. 1542a. The report did not examine innovative educational programs designed to improve the quality of education and Dr. Coleman could not comment on the programs proposed by the school district or on those underway at Manual and

Cole. A. 1537a, 1553, 1554a. When asked for the primary factor present in a predominantly Anglo school which would improve the education of a minority child, he stated that his answer was based on a mere statistical inference:

> "What that means in effect is that, if the inference is correct, is that a child from a linguistically-impoverished background will be most affected by a school situation which has a—which is more linguistic, particularly the rich or different educated environment." A. 1543a.

Dr. Neal Sullivan, former superintendent of schools in Berkeley, California, and, at the time of trial, Secretary to the Massachusetts State Board of Education, also testified for petitioners. His duties included administration of a Massachusetts statute requiring local school committees to eliminate racial imbalance. He had implemented a voluntary program of integration in Berkeley, California, prior to leaving his position there.

He testified that Boston, Massachusetts, had in the planning stage a proposal to construct educational parks costing $200 million as a means of racially balancing that school system, and that some 2000 minority students were being bused to suburban schools under a voluntary transfer plan. A. 1565a. He testified that research indicated that the black child's achievement improved under the voluntary plan (A. 1566a), but gave no specifics. Dr. Sullivan left the Berkeley school system at about the same time the integration plan went into effect and could not testify that integration alone would be sufficient to improve education in any event.

> "Q. You need something more than integration?"
> "A. You bet. Massive reform." A. 1595a.

Petitioners' rebuttal witness, Dr. Robert O'Reilly, a research psychologist employed by the New York State Board

of Education, described a research study of compensatory education programs carried on in various parts of the United States. This study, he admitted was really a study of the reports of other studies and not an independent study. A. 1925a. In his opinion, all the various types of intensive educational programs categorized as compensatory education were entirely valueless, even in an integrated setting, from all indications. A. 1929a, 1930a.

His general opinion was that, with regard to integration, knowledge of the process is not yet so complete nor is what is known so systematically applied that any startling changes in educational development should become evident in desegregated minority students. A. 1957a, 1958a.

Dr. O'Reilly's primary objection to compensatory education programs was that they were generally just more of what the schools already have. A. 1933a. He would recommend new approaches:

> "So, what I'm trying to communicate to you, I guess, is that this is a very unsettled field. There are no hard and fast rules to go on. It's very unlikely that anybody is ever going to come up with a treatment that is going to be generally effective with minority students at all. What has to be done is basically many, many years of experimentation in which we slowly and carefully identify and develop specific programs designed for specific groups, specific minority groups. Because they differ so greatly." A. 1932a.

Dr. O'Reilly testified that the effectiveness of the educational program should not be based on a single indicator and that "there are many, many indicators of the effectiveness of the school that are not necessarily achievement test data." A. 1957a. He would look at such items as students' opinions and how many of the students go on to college.

The court of appeals also recognized that achievement scores were not the sole indicator of the effectiveness of the educational opportunities in the schools and commented that:

> "Pupil dropout rates and low scholastic achievement are indicative of a flaw in the system, but as indicated by appellee's experts, even a completely integrated setting does not resolve these problems if the schooling is not directed to the specialized needs of children coming from low socio-economic and minority racial and ethnic backgrounds. Thus it is not the proffered objective indicia of inferiority which causes the substandard academic performance of these children, but a curriculum which is allegedly not tailored to their educational and social needs." 445 F.2d 1004, A.P. 144a.

Mr. James Ward, principal of Manual High School, has instituted innovative educational programs designed to meet the needs of high school students from low socio-economic areas because the basic traditional program was not meeting the needs of those students. A. 1845a. These included pre-professional studies and work-study vocational training.

The district court summarized some of these programs at Manual, Cole and Bryant-Webster at 313 F.Supp. 95, A.P. 110a, and ultimately ordered the school district to continue these programs.

The effectiveness of these new approaches is dramatically illustrated by use of the "indicators" established by petitioners' expert witness Dr. O'Reilly. The dropout rate at Manual has been reduced and the students are staying in school (Ward, A. 1859a) and more Manual graduates applied to college (58%) than did the graduates of three predomi-

nantly Anglo schools (Thomas, A. 1233, 1234a) and 51% of the graduates actually entered college. Ward, A. 1859a.

None of the petitioners' experts had ever made any studies of or visited any of Denver's schools. In fact, the national survey directed by Dr. Coleman did not include Denver. A. 1562a.

Respondents' main witness at the hearing on remedy was Dr. Robert Gilberts, who had resigned as Superintendent of Schools for the respondent school district effective September 1, 1970, to take a new position as Dean of the College of Education at the University of Oregon. A. 1707a.

Dr. Gilberts had supervised preparation of the respondents' plan to comply with the district court's opinions following trial on the merits (DX VA, A. 2160a) which included a detailed plan for improvement and continuation of the VOE program with space guaranteed, both of which were discussed as remedies in the district court's opinion and which had been included in the Superintendent's original proposal for quality education (DX D). The district court characterized the respondents' plan as "designed to reconstruct the educational climate" and summarized many of its elements in the Decision Re Plan or Remedy. A.P. 109a.

In Dr. Gilberts' opinion, desegregation was not an absolute and necessary first step to the solution of the complex problem of comparatively low achievement among children from low socio-economic environments. A. 1712a. He said: "I agree with Dr. Sullivan's comments . . . that some massive changes are necessary . . . in the entire form of education." A. 1713a. Respondents' plan emphasized new and different approaches to the problem and not just more of the same.

Dr. Gilberts testified that integration is a voluntary process of changing attitudes so that individuals are accepted re-

gardless of their race or ethnicity (A. 1762a) and that, as such, it is necessary in the larger society to prevent the ill effects of racial polarization. A. 1751a. Yet he was not convinced that desegregation in terms of simple racial mixing had any educational advantage *per se* and that one of the reasons for proposing the resolutions in northeast Denver was to test the hypothesis in that regard. A. 1752a. In his opinion, the plan proposed by the respondents had a better probability of success in improving education than that proposed by petitioners. A. 1762a.

SUMMARY OF ARGUMENT

Respondents oppose the demand of petitioners that this Court decree racial and ethnic desegregation, on a system-wide basis, of the Denver school district. Respondents' position is that judicial intervention in the conduct of the Denver school system was never warranted, there having been no constitutional violation properly found by the courts below.

The detailed Statement in this brief is intended not only to show the entire relevant history of the school district's conduct of its affairs, but also to demonstrate that the Denver school district is quite different from the school district described by petitioners. The Denver school district has never excluded a child from any school by reason of race or ethnic origin; it has not continuously, obsessively, and covertly pursued a policy of discrimination toward its pupils; and it has not devoted inferior or different resources to any of its schools. The full facts in this case show that Denver has never practiced discrimination toward any racial or ethnic group and that, until 1964 when Denver adopted an affirmative policy of seeking racial and ethnic heterogeneity to the extent feasible within the neighborhood school policy, the Denver schools had followed a completely color-blind policy as far as pupil assignment was concerned. In short, the

Denver school district is and always has been a unitary system conducted in accordance with the Colorado constitutional mandate prohibiting "any distinction or classification of pupils . . . on account of race or color."

1. *The claims of state-imposed segregation.*

The claims of segregation in the Denver school system were made as to two groups of schools, each substantially separate from the other. The first group was referred to by the courts below as the core city schools, and the second as the resolution schools.

The district court expressly found that the existing racial imbalance in the core city schools was caused by housing patterns and neighborhood population movement and not as a result of any state action. In making these findings, the trial court placed upon the plaintiffs the burden of proving actionable segregation unaided by any presumption that racially imbalanced schools, in a unitary system with no history of discrimination, was caused by school district action. In such a case as Denver's, the allocation of burden of proof was in accordance with all authority and experience in such cases, and was correctly approved by the court of appeals.

As for the resolution schools, the district court failed to find in its earlier opinions that the claimed acts of segregation in the early 1960s caused the racial imbalance existing at the time of trial in any of the schools involved, and thus erred in its apparent conclusion that a constitutional violation existed as to three elementary schools and one junior high school. The evidence clearly showed such imbalance resulted from a massive movement of Negroes into the involved neighborhoods.

The district court erroneously found state-imposed segregation by reason of the rescission of three resolutions of the

Denver School Board in 1969. These resolutions would have required mandatory busing from the resolution school area. By rescission, the Board substituted a voluntary transfer plan which contained all of the elements of the rescinded resolutions except the mandatory boundary changes. The mandatory plan was preliminary, experimental and had not been implemented. No students had been transferred prior to the rescission nor were any transferred by reason of the rescission.

In its later opinion following trial on the merits, the district court noted that the findings of segregative acts in the early 1960s were discussed only as they were probative on the issue of the segregative purpose of the 1969 rescission, and held, in its ultimate finding on this part of the case, that the rescission, per se, was the operative act of segregation, and ordered the implementation of the rescinded resolutions.

The court of appeals affirmed the earlier findings regarding the claimed segregative acts at the four schools, and then erroneously concluded that those acts caused the present racial imbalance in the resolution schools, and thereafter erroneously declined to rule on the question of whether the rescission, in and of itself, was unconstitutional.

On the resolution school part of the case, therefore, the court of appeals should have found that the acts complained of in the early 1960s were not the cause of existing racial imbalance, and, further, that the school board's rescission of the racial balancing resolutions in 1969 was not, as a matter of law, an act of segregation causing the existing racial imbalance.

Nor should the remedy for acts found to have tended to intensify racial imbalance in four schools in the early 1960s extend beyond the reduction of racial imbalance as to those particular schools. Any remedy beyond correcting the ef-

fects, if any, of the earlier violations would be in excess of the power of the courts.

2. *The claims of unequal educational opportunity.*

The other branch of the case does not involve state-imposed segregation. It involves, rather, the question of whether any constitutional violation arises where it is shown that the median scores on standardized achievement tests differ substantially as among the several schools in the Denver school system, and where some, but by no means all, of the schools with relatively low scores also have relatively high percentages of Negro and Spanish surnamed pupils.

The district court found that certain court-designated schools showing low test scores were inferior schools compared with others, that concentrations of Negro and Spanish surnamed pupils were the cause of the inferiority, but that the racial and ethnic concentrations were not caused by actions of the school district. On the basis of these findings, the district court ordered racial balancing of the court-designated schools, together with implementation of the school district's existing program of compensatory education and voluntary majority-to-minority transfer.

The court of appeals, finding no state action causing the racial imbalance nor the educational outcomes in the schools, reversed. The holding of the court of appeals was correct and should be affirmed by this Court.

The neighborhood school policy, as applied in Denver, did not determine the racial or ethnic composition of the schools. This was determined, the trial court found, by housing patterns and population movement. Therefore, the school district did not cause the racial or ethnic concentrations which the trial court had held created an unequal educational environment.

In addition, the evidence in this case and available to the Court shows that median achievement test scores were not a valid basis for comparing educational opportunity among schools within a school system. Nor does the evidence support the conclusion that racial or ethnic concentrations were the cause of claimed inferior schools characterized by low test scores. Both of these conclusions of the district court were clearly erroneous and provide additional grounds for affirming the reversal of the district court by the court of appeals.

The Denver school district has never excluded any pupil at any time because of racial or ethnic origin. It operates on a neighborhood school plan free from racial discrimination and, in addition, for educational reasons, seeks to encourage racial and ethnic heterogeneity through voluntary majority-to-minority transfers with transportation provided. The Denver school district is carrying out its responsibility in full compliance with all the requirements of the United States Constitution.

ARGUMENT

I.
SUMMARY OF APPLICABLE CONSTITUTIONAL PRINCIPLES

A. INTRODUCTION

This case is a class action by parents of children attending the public schools of Denver who complained that their rights to equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States have been violated by alleged racial and ethnic segregation and resulting unequal educational opportunity.

Unlike *Brown v. Board of Education*, 347 U.S. 483 (1954), this case does not arise in a state "having a long history of maintaining two sets of schools in a single school

system deliberately operated to carry out a governmental policy to separate pupils solely on the basis of race" as the *Brown* situation was described by this Court in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, at p. 6 (1971). The policy of the State of Colorado as contained in its Constitution adopted in 1876 is that:

> "No sectarian tenets or doctrines shall ever be taught in the public schools, nor shall any distinction or classification of pupils be made on account of race or color." Article IX, Section 8, Constitution of Colorado.

No "dual system" has ever existed in Denver. Its school system has always been operated as a "unitary system," defined by this Court in *Alexander v. Holmes County Board of Education*, 396 U.S. 19 (1970), as one "within which no person is to be effectively excluded from any school because of race or color." After trial on the merits the district court below found:

> "It is to be emphasized here that the Board has not refused to admit any student *at any time* because of racial or ethnic origin. It simply requires everyone to go to his neighborhood school unless it is necessary to bus him to relieve overcrowding." 313 F.Supp. 73, A.P. 67a. (emphasis added)

School assignment in Denver has always been on the basis of residence in a geographic attendance area, a principle of pupil assignment contemplated by this Court in *Brown II*, 349 U.S. 294 (1955): ". . . [R]evision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis. . . ." 349 U.S. 300, 301.

With the possible exception of *Spencer v. Kugler*, ——

U.S. ——, 30 L.Ed.2d 723 (1972), this is the first case to reach this Court in which it is claimed that racial segregation exists in a unitary school system. *Brown* and the several school segregation cases decided by this Court since *Brown* have dealt solely with the duty of school authorities to dismantle, disestablish and convert former dual systems into unitary systems. *Swann* anticipated the day when former dual systems will have complied with *Brown I* and become unitary systems. At that point:

> "It does not follow that the communities served by such systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system. This does not mean that federal courts are without power to deal with future problems; but in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary." 402 U.S. 31, 32.

Denver does contain a growing, mobile society and it has experienced swift and massive demographic changes in the years since World War II which have caused racial imbalance in its schools.[28]

During the years that Denver's minority population grew in size and moved about the city, Denver's school officials

[28] See statement *supra*, pp. 9-13.

made the numerous policy decisions and took the many actions necessary to govern and administer a fast growing large urban school system.

Of all these actions, petitioners focused in their first cause of action on the building of one new school, a few minor subdistrict boundary changes in the early 1960's, and a policy decision in 1969 to change some unimplemented racial balancing plans from a mandatory to a voluntary approach. After a four-day hearing on preliminary injunction, the district court held that these actions amounted to state-imposed segregation as to four schools in northeast Denver. The court of appeals applied Rule 52, FRCP, and affirmed.

The second cause of action, heard seven months later at the trial on the merits, concerned a larger number of schools located in the core city area of Denver and involved a time period of roughly the ten years preceeding the actions complained of in northeast Denver. The district court held that the evidence did not support the conclusion that state-imposed segregation existed at those schools and that the neighborhood school policy was not unconstitutional per se. Both of these holdings were affirmed by the court of appeals. The district court also held that the racial imbalance at these schools, even though not caused by the school district, resulted in unequal educational opportunity for the children attending them and ordered, as a remedy, reduction of racial and ethnic concentrations. The court of appeals reversed on the ground that no state action had caused the condition.

B. ELEMENTS OF A CONSTITUTIONAL VIOLATION

Swann reminds us that judicial powers may be exercised only on the basis of a constitutional violation (402 U.S. 16) and teaches that:

> "[I]n the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary." 402 U.S. 32.

The Court was speaking of a former dual system which had complied with *Brown* and become "unitary."

Denver always has maintained a unitary system. Plaintiffs, in attacking the existence of schools which are substantially disproportionate in their racial composition, are not aided by the presumption of the continuance of a dual system which arises only in a system with a long history of state-imposed segregation. *Swann*, at 402 U.S. 26.

The court of appeals recognized this principle and applied it below:

> "Where, as here, the system is not a dual one, and where no type of state-imposed segregation has previously been established, the burden is on plaintiff to prove by a preponderance of evidence that the racial imbalance exists and that it was caused by intentional state action." 445 F.2d 1006, A.P. 148a.

This formulation is firmly based on this Court's holding in *Brown I* and other decisions of lower federal courts applying that holding to school districts where the question of a constitutional *violation* is put in issue, as distinct from cases involving concededly dual systems where only the *remedy* is in issue.

In *Brown I*, this Court held that the creation and maintenance by the state of separate schools for Negroes, solely on the basis of their race, was inherently unequal treatment and, therefore, violated the equal protection clause. The

precise question and holding in *Brown I* was "Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does." 347 U.S. at p. 493.

Analytically, the Court's holding involved (1) separate schools for Negroes, (2) caused by state action, (3) purposefully taken solely on the basis of race, and (4) unequal treatment.

Since *Brown* it has been deemed unnecessary to prove the fourth element because the Court found that state-imposed segregation (the combination of the first three elements) results in unequal treatment *per se*.[29] This Court in *Swann* described the constitutional violation announced in *Brown I* in terms of these elements. If, by state action, pupils are deliberately segregated in the schools solely on the basis of race, the Constitution is violated. 402 U.S. 5, 6.

In cases involving dual systems, the objective is to correct the violation by the remedial measures of *Brown II* and subsequent cases. Disestablishment cases are therefore not concerned with the violation, but with the remedy and the school authorities are required to show that all vestiges of state-imposed segregation have been eliminated. *Swann*, 402 U.S. 15.

In unitary systems such as Denver's, one who alleges a

[29]Stated another way, the Court held race to be an arbitrary and impermissible criterion for governing the use of public facilities. The principle was promptly applied to public parks (*Muir v. Louisville Park Theatrical Assn.*, 347 U.S. 971, 98 L.Ed. 1112, 74 S.Ct. (1954)) public beaches and bathhouses (*Mayor and City Council of Baltimore City v. Dawson*, 350 U.S. 877, 100 L.Ed. 774, 76 S.Ct. 133 (1955)), municipal golf courses (*Holmes v. City of Atlanta*, 350 U.S. 879, 100 L.Ed. 76 S.Ct. 141 (1955)) and municipal buses (*Gayle v. Browder*, 352 U.S. 903, 1 L.Ed.2d 114, 77 S.Ct. 145 (1956)), all on the authority of *Brown*.

constitutional violation must show the existence of all the elements of a violation.

First, it must be shown that there is racial separation in the public schools of the system. Something more than mere racial imbalance is necessary; how much more is a problem in itself.[30] Even separation to the extent that the system contains some schools which are all Negro and others that are all white is not sufficient, standing alone, to justify a conclusion that the Fourteenth Amendment has been violated.[31]

The second element necessary to the legal conclusion that the Fourteenth Amendment has been violated is a finding that such racial separation is *caused by state action.* Only actions of the state which deny persons the equal protection of the laws are proscribed by the terms of that Amendment. In *Deal v. Cincinnati Board of Education,* the Sixth Circuit observed:

> "[T]he crucial fact to be found is whether the racial imbalance was intentionally *caused* by gerrymandering or by other alleged discriminatory practices on the part of the Board." 369 F.2d 55, 64. (emphasis added)

The third element necessary to support a conclusion that the Fourteenth Amendment has been violated is that the state action causing the racial separation must have been

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[30]"We pass the unsettling problem which would face every school committee of anticipating what amount of imbalance the local federal court would consider equivalent to segregation. . . . Deciding what is excessive racial imbalance necessarily involves the resolution of expert appraisals of highly intangible factors." *Springfield School Committee v. Barksdale,* 348 F.2d 261 at 264. (1st Cir. 1965).

[31]*Deal v. Cincinnati Board of Education,* 369 F.2d 55, 60 (6th Cir. 1966) *cert. den* 389 U.S. 847 (1966); *Downs v. Board of Education,* 336 F.2d 988, 996 (10th Cir. 1964) *cert. den* 380 U.S. 910 (1964); *Bell v. School City of Gary,* 324 F.2d 209 (7th Cir. 1963) *cert. den* 377 U.S. 924 (1963); *Brown v. Board of Education,* 139 F.Supp. 468, 470 (D.C. Kan. 1955).

based solely on race. This requires proof of purposeful and deliberate action to classify persons on the basis of race. Mere coincidence of result is not enough. The court of appeals for the Second Circuit, in *Taylor v. Board of Education of City School District of New Rochelle*, 294 F.2d 36 (2nd Cir. 1961) *cert. den.* 368 U.S. 940 (1961), approved the crucial finding that race was made the basis for school districting with the purpose and effect of producing a substantially segregated school. In *Downs*, the Tenth Circuit recognized that the element of racial purpose was necessary to a constitutional violation:

> "Of course, we agree with the appellants that the school authorities cannot, under applicable constitutional standards heretofore discussed, use such a change in boundary lines or the neighborhood school system as a guise for the purpose of perpetuating racial segregation. The trouble is that there is no evidence to show that the boundary line was change *for that purpose*." 336 F.2d 996. (emphasis added)

But of the several elements making up the constitutional violation, the most important, as emphasized by the district court, is a "causal relationship between the discriminatory action complained of and the current condition of segregation in the school or schools involved." 313 F.Supp. 74, A.P. 70a.

It is the absence of this causal relationship, in addition to the absence of segregatory purpose, which required the courts below to conclude that there was no actionable segregation in the Denver school system, except arguendo as to four resolution schools.

C. THE BURDEN OF PROOF

The rules relating to the burden of proof of the elements of actionable segregation which have governed actions in-

volving school districts which do not maintain dual systems were well summarized by the court of appeals:

> "Once a prima facie case is made, the defendants have the burden of going forward with the evidence. Hobson v. Hansen, 269 F.Supp. at 429. They may attack the allegations of segregatory intent, causation and/or defend on the grounds of justification in terms of legitimate state interest. But the initial burden of proving unconstitutional segregation remains on plaintiffs." 445 F.2d 1006, A.P. 148a.

This accurately formulates the universal rule regarding burden of proof followed in the federal courts in cases involving no relevant history of segregation (See, e.g. *Deal* at p. 571, *Wright v. Rockefeller*, 376 U.S. 52 at 56 (1964). This rule is related to the presumption accorded to school authorities, bound by state constitutions or laws making state-imposed racial segregation in the schools unlawful, that their actions are taken in accordance with law. In *Deal v. Cincinnati Board of Education*, 244 F.Supp. 572 (1965), the district judge, commenting on the failure of plaintiffs to carry their burden of proof, said at pp. 581, 582:

> "In a case involving similar issues, a colleague in this Circuit has recently recognized the well established principle that '. . . *public officials are presumed to have properly discharged their duties.*' (Craggett v. Board of Education of Cleveland, 234 F.Supp. 381, 386 (N.D. Ohio 1964, Kalbfleisch, J.)). . . . This proposition has also been in part at least the basis of determinations sustaining school boards in Bell v. School, City of Gary, Indiana, 213 F.Supp. 819 (N.D.Ind.), aff'd, 324 F.2d 209 (7th Cir.), cert. denied, 377 U.S. 924, 84 S.Ct. 1223, 12 L.Ed.2d 216 (1963)

(Plaintiffs' contend this case to have been 'wrongly decided.'); Downs v. Board of Education, 336 F.2d 988 (10th Cir. 1964), cert. denied, 380 U.S. 914, 85 S.Ct. 895, 13 L.Ed.2d 800 (1965); Lynch v. Kenston School Dist., 229 F.Supp. 740 (N.D.Ohio E.D. 1964), (appeal to the 6th Circuit Court of Appeals dismissed by plaintiffs-appellants July 2nd, 1965); Northcross v. Board of Education, 333 F.2d 661 (6th Cir.), cert. denied, 370 U.S. 944, 82 S.Ct. 1586, 8 L.Ed.2d 810 (1964); and Barksdale v. Springfield School Committee, 237 F.Supp. 543 (D.C.Mass.), rev'd, 348 F.2d 261, (1st Cir. 1965)." (emphasis added)

Petitioners seek the adoption of a new standard of proof which would, in effect, cast upon school authorities the burden of disproving allegations of actionable segregation in any racially imbalanced school system. There is no authority for such a reversal of the burden of proof in a unitary system such as Denver's. This contention is fully discussed later in this brief at pp. 82-87.

II.

RACIAL IMBALANCE IN DENVER PUBLIC SCHOOLS WAS NOT CAUSED BY STATE ACTION

In the two opinions following the preliminary hearing, it is clear that the District Court misapprehended the elements of a constitutional violation when it concluded, in essence, that the failure of the Board to take action to alleviate racial imbalance, although not state-created, amounted to a violation of the Constitution.

By the time of the trial on the merits, the district court

had a clearer view of the constitutional principles of law as enunciated by this Court and some lower courts and recognized that judicial powers were limited to state-created segregation in schools, in violation of the Constitution. This is evident by the court's remarks during the trial on the merits and the substance of its opinions following that trial. The court then recognized that to be actionable, the school authorities must have acted with the purpose and effect of creating segregation in the school or schools in question, and that such action must have been the cause of racial imbalance present and existing at the time of trial. 313 F.Supp. 73-75, A.P. 67-71a.

Accordingly, the findings of the district court in the opinions following the preliminary hearing must be evaluated in light of the opinions subsequent to the hearing on the merits.

It was the absence of the element of causal relationship, in addition to the absence of segregative purpose, which was the basis for the conclusion of the courts below that there was no actionable segregation in the Denver school system (except in four specific schools, which we shall show was the result of an erroneous conception of the law).

A. THE COURTS BELOW CORRECTLY FOUND NO STATE-IMPOSED SEGREGATION IN THE CORE CITY SCHOOLS.

1. The findings regarding the core city schools were fully supported by the evidence and were correctly sustained by the court of appeals.

With respect to these core city schools, the following portions of the district court's opinion following trial on the merits are pertinent:

"The evidentiary as well as the legal approach to the remaining schools is quite different from that which has been outlined above. For one thing, the concentrations of minorities occurred at an earlier date and, in some instances, prior to the *Brown* decision by the Supreme Court. Community attitudes were different, including the attitudes of the School Board members. Furthermore, the transitions were much more gradual and less perceptible than they were in the Park Hill schools." 313 F.Supp. 69, A.P. 57a

* * *

"It is to be emphasized here that the Board has not refused to admit any student at any time because of racial or ethnic origin. It simply requires everyone to go to his neighborhood school unless it is necessary to bus him to relieve overcrowding." 313 F.Supp. 73, A.P. 67a

* * *

"So also in our case, the complained of acts are remote in time and do not loom large when assessing fault or cause. The impact of the housing patterns and neighborhood population movement stand out as the actual culprits." 313 F.Supp. 75, A.P. 71a

* * *

"In summary, then, we must reject the plaintiffs' contentions that they are entitled to affirmative relief because of the above mentioned boundary changes and elimination of optional zones. We hold that the evidence is insufficient to establish *de jure* segregation." 313 F.Supp. 77, A.P. 75a.

The court of appeals as to these schools affirmed under Rule 52, as follows:

"The trial court held that cross-appellants [petitioners] failed in their burden of proving (1) a racially discriminatory purpose and (2) a causal relationship between the acts complained of and the racial imbalance admittedly existing in those schools.

"The evidence in this case is voluminous, and we have attempted to carefully scrutinize it. Thorough review reflects that cross-appellants have introduced some evidence which tends to support their assertions. However, there is also evidence of record which supports the findings of the trial court, so under Rule 52 F.R.Civ.P. 28 U.S.C., we must affirm." 445 F.2d 1006, A.P. 148a.

While professing not to challenge the district court's fact findings regarding core city scools, petitioners contend that as to findings on two such schools, Manual and Cole, the court should have found discriminatory acts on the part of the school district and secondly, that such acts were the cause of the racial imbalance in those schools at the time of trial.

The trial court expressly found contrary to those claims of the petitioners as demonstrated by the above quoted portions of the court's opinion. As to intent, the district court also found:

"Quite apart from the cause element which will be discussed further below, it cannot be said that the acts were clearly racially motivated. One would have to labor hard in order to come up with this conclusion." 313 F.Supp. 75, A.P. 71a.

There was ample evidence to support this finding.

The district court thoroughly considered the construction

of a new Manual High School building at the same site as the old building and with the same attendance area.

As the court of appeals pointed out (445 F.2d 1006, A.P. 149a), the racial change at the school since 1927 had been gradual. PX 356, p. 5, A. 2086a. The racial makeup in 1950, when the planning for the new school was taking place, was majority white,[22] and the "community concern was with the nature and character of the new facility," rather than its racial makeup. 313 F.Supp. 70, A.P. 59a. As for the 1956 Manual-East boundary change, the trial court found that it was justified by the overcrowding at East and that the suggested alternative of a larger boundary change would not have had any significant or enduring integrative effect. 313 F.Supp. 70, A.P. 61a.

Similarly, the claim that the Manual and Cole boundary changes in 1956 "insured" that the schools would later become predominantly Negro cannot stand analysis. In essence, petitioners claim that the district court failed to find present segregative effect. The trial court, in discussing this claim, recalled that an essential requisite of a constitutional violation is state action which produces the presently existing segregation complained of. Upon a review of the evidence, the court found that the boundary changes did not have segregative effect either at the time in 1956 or at the time of trial. 313 F.Supp. 75, A.P. 71a, 72a. Again, the court made express findings on the acts complained of and there was ample evidence to support the finding.

The effect of the boundary change on minority concentrations in 1956, the court found, was simply not known or shown. 313 F.Supp. 75, A.P. 71a, 72a. Moreover, since much of the racial and ethnic concentration in the schools occurred after 1956, without any action on the part of the

[22] 27.7% Negro, 23.5% Spanish origin, 40.7% other white, and 8.1% Oriental PX 356, p. 5, A 2086a.

school district, there was ample evidence to support the court's finding that the present concentrations in those schools were not caused by the school district. 313 F.Supp. 75, A.P. 72a.

In criticizing these findings, petitioners analogize to an inapplicable principle from *Swann*. They rely on the principle that a school district, in dismantling a dual system, must avoid closing racially mixed schools and building new schools remote from Negro population centers, thereby promoting segregated residential patterns. *Swann*, 402 U.S. at 21. This never happened in Denver. The proper analogous principle, instead, is that in a unitary system such as Denver's, there is no constitutional duty to make year-by-year adjustments in racial balance, in the face of demographic change, where the school district is not shown to have deliberately acted to change demographic patterns to effect the racial composition in the schools. *Swann*, 402 U.S. at 32. In the case at bar, segregative purpose and effect as to boundary changes must have been shown before an actionable violation can be found. These elements were not shown and the trial court so held.

Finally, petitioners fault the court of appeals for not considering a factor the district court had also refused to consider with respect to these schools, namely, the continuing but declining (DX DG, A. 2146a) disproportion of Negro teachers teaching in several majority-Negro schools. Teacher assignments received great emphasis by plaintiffs in their evidentiary presentation and in their arguments here. With one exception, no Denver school ever had more than 50% minority teaching staff and that justifiable exception is discussed in the Statement at pp. 47-49, *supra*, along with the distribution of minority teachers throughout the system.

The district court made no mention of the racial propor-

tions of teachers in either the core city schools or the resolution schools in its opinion on the merits.

In Denver, teachers were never assigned with either the purpose or effect of identifying particular schools by race. Denver has vigorously pursued a policy of recruitment of minority teachers since 1964 and has assigned such teachers throughout the system. Stetzler, A. 1155a-1171a.

The teacher assignment policy prior to 1964 and the subsequent policy followed since then are best described in the opinion of the court of appeals:

> "[The Board] operated on the prevailing educational theory of the day, the Negro pupils related more thoroughly with Negro teachers. The rationale was that the image of a successful, well educated Negro at the head of the class provided the best kind of motivation for Negro children and that in turn the Negro teacher had a greater understanding for the Negro pupil's educational and social problems. Although the validity of that theory is under severe attack today, we do not agree that the results of its past application infer segregatory intent. In response to new educational theories, the Denver public school system has today assigned Negro teachers to schools throughout the system and has reduced the percentages of Negro teachers in the predominantly minority schools." 445 F.2d 1007, A.P. 150a, 151a.

The record abundantly supports the refusal of both lower courts to find evidence of segregatory intent from the assignment of teachers.

2. The policy of the Denver School District has been nondiscriminatory throughout.

Petitioners assert in their brief, that the school district followed a ten year policy of racial segregation during the 1960s. On this assertion, petitioners then build the argument that as to their claims of state-imposed segregation in the core city, the burden of proof as to the elements of intent and of causation and the burden of justification of racial imbalance should be shifted to the school district.

This argument quite obviously disregards the time of the alleged segregative acts with regard to the core city schools. The evidence at the trial on the merits relating to these schools consisted of the replacement of one school building and some school boundary changes during the 1950s. The claimed "policy of segregation" is not only non-existent as we show below, but the alleged discriminatory acts in northeast Denver occurred in the 1960s, after the core city actions were taken. Petitioners would thus apply such a policy retroactively and impute unlawful intent to the acts of the 1950s from acts of the 1960s.

Secondly, the alleged ten year policy applied only to 4 predominantly minority and 4 Anglo northeast Denver schools, as petitioners candidly admit in their brief, p. 71, and not to other areas of the system.

Thirdly, petitioners' assertions regarding the ten year policy are not supported by the ultimate findings of the district court. Here, it is necessary to take a careful look at what the trial court found and at what stage of the development of the case. It should be remembered that the district court entered four principal opinions over a period from August 14, 1969, to May 21, 1970. The first two opinions followed a hearing on a motion for preliminary injunction, were prepared under the pressure of the approach of the opening of school in September, 1969, on the basis of only

four days of evidentiary hearings and without having heard the case fully on the merits. Thus, where inconsistencies appear between the early opinions in 1969 and the later opinions in March and May of 1970, after full hearing on the merits, the opportunity for more careful and complete consideration of issues in the later opinions becomes significant.

In both of the opinions following the preliminary hearing, it is apparent that the court misapprehended the law. The court went beyond the constitutional concept that only state created segregation was violative of the 14th Amendment. Although having recognized the historical practice of pupil assignment in Denver under the neighborhood school policy, the court obviously concluded at that time that the state of the law proscribed not only state-imposed segregation, but also mere inaction or continuance of a neighborhood school policy without affirmative attempts to alleviate the resulting racial imbalance in an urban school district. As indicative of the erroneous concept of *Brown I* as applied to a dual system, the court stated:

> "Thus the clear import of the *Brown* decision is that neither a state or its agencies may establish, *maintain or lend support* to a system of segregated public education. Furthermore, if the state or any of its agencies prior to or after *Brown* take any action which creates *or furthers* segregation, a positive duty arises to remove the effects of such de jure segregation." 303 F.Supp. 286, A.P. 13a (emphasis supplied to demonstrate the disjunctive)

Although the court proceeded to discuss the 10th Circuit decision in *Downs v. Board of Education*, 336 F.2d 988, (1964), the district judge questioned that opinion particularly in view of the decisions in the 5th Circuit. 303 F.Supp. 286, 287, n 8, A.P. 15a.

Thus prior to the hearing on the merits, the district court proceeded on the premise that the mere maintenance *or* continuance of racial imbalance in some schools was a constitutional violation and hence it made a general finding of a ten year policy of segregation. After making its general finding of ten years of segregation, the court further stated:

> "To maintain, encourage and continue segregation in the public schools in the face of the clear mandate of Brown v. Board of Ed. cannot be considered innocent" 303 F.Supp. 287, A.P. 16a.

A later statement by the court that a duty existed to remove segregation which had developed as a result of prior affirmative acts does not lessen the impact of the foregoing statements.

Following trial on the merits lasting over a period of 4 weeks, the court made some new findings and incorporated some old ones. It did not incorporate the mentioned ten year segregation policy and made no similar new findings, after having heard the school district's evidence. The significant findings as to the boundary changes for the core area from 1952 to 1962 was as follows:

> "There is no comprehensive policy apparent other than the negative approach which has been described . . ." 313 F.Supp. 76, A.P. 74a.

In the opinion after the hearing on the merits, there is clearly apparent a change and tightening up in the court's thinking and understanding of the constitutional concepts. Thus the district court discussed in detail the various elements necessary to be proven to establish a constitutional violation and held that there must be not mere inaction but affirmative acts of segregation purposefully or intentionally done and with a causal relationship to the conditions of racial imbalance existing at the time of trial. See Opinion of March

21, 1970, 313 F.Supp. 61, particularly pages 73 to 75; A.P. 67a to 70a.

The court also found that in 1962 the school district "was carrying out a racially neutral policy" in connection with boundary changes that year. 313 F.Supp. 76, A.P. 73a. Finally, and most significantly, the court describes the Board's policies during the ten years of rapid racial change in Park Hill as a

> "[P]rior undeviating policy of refusing to take any positive action which would bring about integration in the Park Hill Schools." 313 F.Supp. 66, A.P. 51a, 52a.

Even this description of the school district's policy, stated in terms of racially neutral inaction rather than affirmative action, was, we submit, contrary to the facts. Significant steps were taken from 1962 onward, as a matter of educational policy, to promote racial and ethnic heterogenity in the schools. (see Statement pp. 37 to 47).

After trial on the merits the district judge described the policy of the 1960s in Park Hill as one of racially neutral inaction while racial changes in the Park Hill neighborhoods resulted in corresponding changes in the schools there. The district court thus significantly modified its earlier comments regarding a "policy of segregation in Park Hill," made seven months earlier after the hearing on the preliminary injunction but before hearing on the merits.

3. The courts below correctly allocated the burden of proof.

Under the rules relating to burden of proof discussed earlier (*supra* pp. 70-72), as applied by the trial court in this case, the plaintiffs failed to prove, as to the acts complained of in the core city area, both segregative purpose and any

causal relationship to the present racial imbalance. The trial court found, accordingly, that there was no state-imposed segregation as to those schools. The court of appeals affirmed, applying Rule 52 F.R.C.P.

Petitioners complain that the courts below misplaced the burden of proof of actionable segregation. They seek to have this Court enunciate a new rule, substantially as follows: "Where a court finds one or more instances of discriminatory practices or factors in a school system and there exists within that system some degree of racial imbalance (even though not state-imposed), then the burden, not of going forward, but of proof, shifts to the school district to prove that the racial imbalance is justified by some compelling state interest."

Such a rule finds no authority in decided cases. Petitioners cite as their only source a law review article.[33]

To support the application of such a rule in this case, petitioners resort to charges such as "blatant discrimination", racially "distorted management", "covert policy", and subterfuge", none of which are contained in the record or in the findings of the district court.

The facts, as found by the courts below, are in sharp contrast with these assertions. Discriminatory acts were found to have occurred only as to three elementary schools during the early 1960s four or more years *after* the acts complained of relating to the core city schools, and would not, therefore, be part of a "history of discrimination" at the time in question. Thus, the court of appeals correctly refused to impose on the school district the burden of proving the non-existence of segregative acts, since "no type of state

[33]Dimond, *School Segregation in the North: There is but One Constitution*, 7 Harvard Civil Rights—Civil Liberties Law Review 1 (1972), (hereinafter, Dimond.) which describes the rule as a "proposed standard" (p. 32)

imposed segregation has previously been established" 445 F.2d 1006, A.P. 148a.

The petitioners' urging of such a rule was considered by the court of appeals, which stated:

> ". . . . [I]t would be incongruous to require the Denver School Board to prove the non-existence of a secret, illicit, segregatory intent. . . . Such an onerous burden does not fall on school boards who have not been proved to have acted with segregatory intent." 445 F.2d 1005, 1006, A.P. 147a.

We submit that if three instances of problematical segregative acts affecting three elementary schools in a system of 119 schools over a twenty-year period of inquiry, meets the test of "one or more instances of discriminatory practices or factors", and if "some degree of racial imbalance" means simply racial imbalance without proof of cause, as it surely must, then the proposed rule is nothing more nor less than the application of rules governing dual school systems to all public school systems in the Nation wherever racial imbalance exists, regardless of cause.[34]

In short, the rule petitioners urge has no application to the Denver case. The rule urged actually is that racial imbalance within a school system creates a conclusive presumption of state imposed segregation. Such a rule has no basis in any authority, and its proponents can offer none.

Of the many cases dealing with school systems which were not concededly dual systems at the time of trial, *Hobson v. Hansen*, 269 F.Supp. 401 (D.D.C., 1967), speaks most directly to petitioners' contention that "some" discrimination,

[34]Indeed, this is exactly what Mr. Dimond proposes. "The standard for review set forth here holds all school segregation actionable . . . unless insubstantial or adequately justified." Dimond, p. 11 (n. 43).

coupled with racial imbalance, triggers a shift of burden of proof. In the District of Columbia, the school authorities had deliberately maintained a dual system with complete racial separation until only 12 years *prior* to trial. (In Denver, the alleged discriminatory acts in northeast Denver occurred *after* the alleged acts pertaining to the core city). When the District of Columbia desegregated in 1954, immediately after the decisions in *Bolling v. Sharpe*, 347 U.S. 497 (1954) and *Brown I*, by the adoption of a neighborhood school plan, 27% of its schools remained one-race. This racial imbalance intensified during the next 12 years, so that by the time of trial in 1966, 87% of the District's schools were more than 85% of one race. 259 F.Supp., at 411, 412. Yet Judge Wright refused to relieve the plaintiffs of the burden of proof or shift the burden of justification to the school authorities. 259 F.Supp. at 495.

The standards formulated by the court of appeals represent the consistent rule of the federal courts in these non-dual cases, as we have discussed above. pp. 70-72. When school districts operate under state laws making racial separation in the schools illegal or unconstitutional, the school authorities are entitled to the presumption that their actions are lawful, and the burden is on the party challenging such actions to establish unlawful discrimination.

While there is no universal working rule as to the allocation of burden of proof, the standards develop out of experience in different types of situations as "a question of policy and fairness based on experience in the different situations." IX Wigmore, *Evidence*, Sec. 2486 (1940 ed.). The rules applied in cases of this kind are the ones which have best satisfied the basic requirements of fairness.

The "fairness" of the rule must be evaluated by considering the complexities of a school system in a large urban city. The over-all racial composition of large urban school dis-

tricts, and the schools within them, is determined by a myriad of factors completely outside the control of the school authorities. These factors, many of which this case illustrate, may and often do include rapid and unpredictable population growth and movement, annexation by separate governmental entities, freeway and urban renewal construction, and construction or abandonement of neighborhood parochial schools. To require such a school district to overcome the virtually conclusive presumption that all racial imbalance in its schools is the result of allegedly discriminatory acts would impose a punitive burden wholly unrelated to fairness. Furthermore, in this case, as the record shows, the plaintiffs had access to and analyzed with computer assistance all of the records of the school district. There were no facts or expertise available to the school district not equally available to the plaintiffs and in fact used by the plaintiffs in a most thorough manner.

Where, as in this case, multiple classifications of racial and ethnic groups are involved, and where plaintiffs purport to sue on behalf of all of the several classes, a serious danger would be introduced if the school authorities were put in the position of being required to justify repeatedly all existing aggregations of minority and ethnic pupils merely at the instance of a suit by one or two of their members. Other members of the classes represented may not perceive their neighborhood residential and school attendance arrangements as being contrary to their own interests. At the beginning of the hearing on remedy following trial on the merits, the district judge took note of this problem:

> "The Court: Now, you undertake to represent the Hispano community too?
> Mr. Greiner: That's correct, Your Honor.
> * * * *
> The Court: . . . I'm merely saying that our basic

> legal problem is remedying the invasion of the constitutional rights. And if it's true that there is a segment that says their rights are not violated, why, I don't see that it is any of our business to say, 'Well, they are. And you're going to get them remedied whether you like it or not.' I just don't —Not a single Spanish-origin person has appeared here demanding relief or even suggesting that any should be granted to them.
>
> Mr. Greiner: Well, I think the only basis upon which we can proceed, Your Honor, is the status of the record and the record—in the record there is no dissenting Hispano intervenors." A. 1515a, 1516a.

Nor does the rationale for the presumption applied in *Swann* to substantially one-race schools in a dual system in the process of desegregating (*Swann*, 402 U.S. 26) warrant the carrying over of that presumption to racially imbalanced unitary systems. In a dual system, especially at this late date, the constitutional right and remedy are so clear-cut and the instances of evasion of duty by dual school systems (e.g. *Green v. County School Board*, 391 U.S. 430 (1968)) have been so frequent that a shift of burden is warranted. But the circumstances are vastly different in a school system like Denver's which has never been a dual one and which has no history of state-imposed segregation except, arguendo, as to the four resolution schools which was not substantial but *de minimus* under all of the circumstances of this case.

We submit that neither experience, fairness, authority, nor logic requires a departure from the principles of burden of proof followed by the courts below.

B. THE ONLY ACTIONABLE SEGREGATION FOUND AS TO THE RESOLUTION SCHOOLS WAS THE RESCISSION OF THREE RESOLUTIONS, A FINDING WHICH IS ERRONEOUS AS A MATTER OF LAW.

1. The findings regarding the three elementary schools and the junior high school did not include a finding of present segregative effect and do not support a finding of actionable segregation.

We are here concerned with whether there has been a violation of the Constitution.

> "[I]t is important to remember that judicial powers may be exercised only on the basis of a constitutional violation. Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary." *Swann*, 402 U.S. 16.

A constitutional violation requires a showing of intentional state action causing presently existing racial segregation. We refer again to the Constitutional principles discussed in Part I above. pp. 66-70.

When the district court's findings with regard to the resolution schools are viewed in the light of such principles, it must be concluded that such findings were insufficient to support the court's legal conclusion of state-imposed segregation as to any of those schools. The legal conclusion was therefore erroneous.

The findings related to only three elementary scools and one junior high school. The first of these schools was Barrett elementary, where substantial racial imbalance was found to exist at the time it was built and opened in 1960. The trial court found that the school district built Barrett

with the intent to create a predominantly Negro school (313 F.Supp. 64, A.P. 48a) stating, as the principal reason, that the school could have been built with greater capacity to serve an area on the other side of a major traffic artery where fewer Negroes lived. 313 F.Supp. 65, A.P. 49a. The court of appeals likewise found segregative intent on those facts. 445 F.2d 1000, 135a, 136a.

But neither court found that the construction of Barrett had any continuing effect, at the time of trial, on the racial characteristics of Barrett or any other school in Denver. The construction of Barrett had no racial effect on either residential patterns or school racial proportions. There was no significant change in the number of children living in the area served by Barrett and the four schools surrounding it between 1959 and 1960[35]. Thus, no new pupils were drawn into the area by the building of Barrett; the new school simply added needed school capacity in a neighborhood where the pupil population had previously increased causing an overcrowded condition in the existing schools. See Statement, pp. 26-29.[36]

As a preface to discussion of other boundary changes among the other three northeast Denver elementary schools in the decade between 1960 and the trial in 1970, it must be kept in mind that such actions were taken during substantial demographic changes. Between 1960 and 1970 the Negro population for the entire City of Denver increased from 30,251 (6.1%) to 47,011 (9.1%). During the same period the Park Hill (northeast Denver) Negro population increased from 566 (1.7%) to 18,516 (50.2%) with an in-

[35] See 445 F.2d 1000, A.P. 135a, n. 3.

[36] A Negro spokesman had suggested to the school board in 1959, as an alternative to a new school, the addition of capacity to Harrington, immediately to the north (PX GC), which illustrates that the purpose of the construction of Barrett was to meet the then existing need for increased school capacity, not to alter or influence demographic patterns.

crease of the total population of the area from 32,679 to 36,893 residents (Statement, pp. 10, 11, *supra*.)

As to the assignment of the Hallett-Philips optional area to Philips in 1962, the court assumed that the white pupils residing in the area were choosing to attend Hallett and then found that they were thereby reassigned to Philips. 303 F.Supp. 293, A.P. 29a. Actually, both schools were insignificantly different in racial composition in the spring of 1962 when the superintendent made the change (Hallett was 95.8% white, Philips was 99.6% white. PX 393). Therefore, both the assumption and the finding were erroneous. But more importantly, there was no finding that this action had or could have had any effect on the racial composition of either school in 1970 at the time of trial.

In 1964, in response to the Special Study Committee recommendations (A. 301a), the two-block optional area between Stedman and Park Hill was abolished and assigned to less crowded Park Hill, another two-block strip on the east side of Stedman's attendance area was assigned to Hallett, and an area in the southeast corner of the Hallett area was assigned to Philips equidistant to the south. As between Stedman and Hallett, *both* schools gained about 100 Negro pupils after the boundary change between them (PX 242, A. 2050a), a result which could not possibly have been caused by the boundary change. Hallett's Negro percentage increased from 28% to 42% (P. 243, A. 2053a), despite the fact that the pupils in the area changed from Hallett to Philips were 70% Negro (McLaughlin, A. 1143a), which is confirmed by the increase of Negro pupils at Philips from 4 to 96 after the boundary change. PX 243, A. 2053a. The evidence thus showed that the boundary changes among Stedman, Hallett, and Philips in 1964 had no segregatory effect at the time, despite the findings of the district court made prior to the trial on the merits. No boundary changes

were made among these schools between 1964 and the time of trial, and during that period the racial change within the schools continued unabated.[37]. On this record there is no possible basis for a finding that the 1964 boundary changes, whatever their effect at the time, had any effect on the racial balance in the resolution schools at the time of trial in 1970. Indeed, the district judge, in his opinion on the merits, suggested as much. 313 F.Supp. 74, A.P. 70a, n. 18. Earlier, he stated: "The migration *caused* these areas to become substantially Negro and segregated." 303 F.Supp. 282, A.P. 4a. (emphasis added)

Findings regarding the fourth school, Smiley Junior High, appear only in the district court's second opinion. 303 F.Supp. 293, 294, A.P. 30a, 31a. The sole connection between school district action and Smiley's racial composition, the trial court found, was the so-called feeder relationship. The court attached a map as an appendix to the opinion (303 F.Supp. 297, A.P. 38a) to explain its finding that

> "[A]ny factors affecting the racial composition of the elementary schools will also have a similar effect upon Smiley." 303 F.Supp. 294, A.P. 32a.

and that

> "[S]egregated situations at Barrett, Stedman, and Hallett . . . ultimately led to a substantially segregated situation at Smiley." 303 F.Supp. 295, A.P. 33a.

The fallacy of the court's latter finding on Smiley is demonstrated by the map itself, which shows that the Smiley attendance area encompassed all of the schools affected by the boundary changes in 1962 and 1964. The elementary

[37]At the time of the preliminary hearing, the Negro percentages were: Stedman, 92.4%; Hallett, 84.4%; Philips, 36.6%; and Park Hill, 23.2% (PX 243, A. 2053a).

school attendance areas are all within the Smiley Junior High School subdistrict, and boundary changes among them could have no effect whatsoever on the pupil population at Smiley. Whether or not the changes were made, the same children would go on to Smiley.

Similarly, whether or not crowding was relieved at Stedman or Hallett by added classrooms or mobile units, the pupils at those schools would continue to live in the Smiley subdistrict. Nor did the existence or non-existence of Barrett school change or affect the racial composition of Smiley. The children in the Barrett area, until 1964, were in an optional area with Smiley, and thereafter were assigned, in accordance with Policy 5100, to Gove Junior High to the south, in order to improve racial balance at both junior high schools.

The inherent difficulty in the trial court's findings of fact as to Smiley led the court of appeals to go beyond the findings and refer to testimony in the record that white students in the Smiley attendance area were permitted to transfer to another school. 445 F.2d 1001, A.P. 138a. But the court of appeals failed to notice that the testimony referred to only four families, one of whom was Negro, during the entire period from 1964 to 1969, and that the assignments were made for valid non-racial reasons. Morton, A. 657a. Neither court below expressly found that the school district had acted to confine Negro pupils in Smiley, and there was no finding of any school district action causing racial imbalance at Smiley at the time of trial.

With respect to the legal conclusion that the four resolution schools were segregated, the essential element that state action *caused* the present racial imbalance at those schools was wholly absent and therefore, no constitutional violation exists. "Absent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis." *Swann*, 402 U.S. 28.

2. The findings as to the four resolution schools were ultimately used by the trial court only as a basis for finding segregatory intent in the rescission of the unimplemented racial balancing resolutions.

The original findings regarding the resolution schools were made after the hearing on the preliminary injunction prayed for in plaintiffs' first cause of action, which the district court said "deals *solely* with the purpose and effect of the rescission of [the] Resolutions." 313 F.Supp. 63, A.P. 46a (emphasis added). These resolutions, the court added, "were designed to relieve [de facto] segregation[38] and the tendency toward [de facto] segregation in schools located in . . . northeast Denver." 313 F.Supp. 64, A.P. 47a. The plaintiffs claimed, the court said, that the rescission of the resolutions was "unconstitutional because its purpose and effect was to perpetuate racial segregation" in the affected schools. 313 F.Supp. 64, A.P. 47a. The rescission of the three earlier resolutions was accompanied by the adoption of a substitute resolution, No. 1533 (PX 6a, A. 2111a), which contained all the elements of the substituted resolutions except the mandatory pupil reassignment for racial balancing purposes.

The plaintiffs' efforts, then, in seeking an injunction under their first cause of action, was to show that the school board, knowingly and with segregatory motive, maintained previously existing racial and ethnic separation and thus resegregated children on the basis of race and ethnic origin.

[38]We add "de facto" where the district judge uses the word "segregation" or "segregated" without the "de jure" qualification. The judge consistently used the unqualified terms in the descriptive or neutral sense of racial imbalance or de facto segregation not resulting from school district action. He was careful always to use "de jure segregation" or "de jure segregated" when he meant racial concentrations caused by school district action. Nevertheless, because "segregation" is freighted with connotations of deliberate or purposefully imposed separation, we have used throughout this brief other terms such as "racial imbalance."

Third and fourth counts, A. 20a, A. 21a. To obtain a declaration that the change of plans violated the Constitution would require a showing that the act of rescission was taken (a) with segregatory purpose and (b) with the effect of bringing about racial separation.

We submit that the district court's findings of state-imposed segregation in the early 1960s at Barrett, Stedman, Hallett, and Smiley were not, in the final analysis, the basis for the court's order directing the implementation of the rescinded resolutions.

The injunction order rested, instead, squarely on the conclusion of law that the rescission "in and of itself was an act of de jure segregation" in 1969. 303 F.Supp. 295, A.P. 35a; 313 F.Supp. 66-67, A.P. 52a.

The court explained this in the opinion following trial on the merits:

> "*Although past discriminatory acts may not be a substantial factor contributing to present segregation*, they may nevertheless be probative on the issue of the segregative purpose of other discriminatory acts which are in fact a substantial factor in causing a present segregated situation. Thus, in Part I of this opinion, we discussed the building of Barrett, boundary changes and the use of mobile units as they relate to the purpose of the rescission of resolutions 1520, 1524, and 1531." 313 F.Supp. 74, A.P. 70a, n. 18 (emphasis added).

The purpose of the rescission, the court found, was to maintain existing de facto segregation in majority-Negro schools and permit the trend of increasing Negro percentages to continue in those schools, such as East, Park Hill, and Philips, which were still majority-white in 1969. 313

F.Supp. 67, A.P. 53a, 54a; 303 F.Supp. 292, A.P. 27a. The substitution of the mandatory measures for undoing the effects of racial shifts with a voluntary program (Resolution 1533) was found to be a constitutional violation. 313 F.Supp. 67, A.P. 53a.

The district judge's last retrospective summary of what he had done is the most telling. In his opinion of May 21, 1970, three months after his opinion on the merits, he recalled what had happened during an intensive year of hearings, trials, and multitudes of briefs and arguments. He had found, he wrote:

> "[T]hat certain schools, elementary, junior high and high schools within an area of Denver known as Park Hill, and also some 15 schools within the core city, were segregated." 313 F.Supp. 91, A.P. 100a.

Significantly, the district judge is including in the one category of "segregated", East High School, Cole Junior High, and Park Hill and Philips Elementary Schools, all of which were expressly found not to be de jure segregated, as well as all of the remaining core city schools, also expressly found not to be de jure segregated. He was using "segregated", standing alone, in his consistent sense of de facto segregated. In other words, all schools were found, in 1970, to be de facto and not de jure segregated (absent effects of rescission as to the resolution schools).

Then the district judge succinctly stated his finding regarding de jure segregation:

> "[The Order of March 21, 1970] also concluded that our temporary injunction entered in August 1969, finding a condition of de jure segregation in certain schools *resulting from* the Denver Board of Education's action rescinding Resolu-

tions 1520, 1524 and 1531, which had been designed to have an integrating effect on Park Hill schools, must be made permanent." 313 F.Supp. 91, A.P. 100a. (emphasis added)

We submit, accordingly, that the only act of actionable segregation found by the district court to have effect at the time of trial was the rescission of the resolutions.[39]. The only way the court could extend the injunction to non-segregated schools such as East and Cole was on the basis of a holding that the rescission was the operative de jure act. 313 F.Supp. 67-69, A.P. 54a-57a.

Thus, the court of appeals, in reviewing and sustaining, under Rule 52, the district court's findings of earlier acts regarding the three elementary schools (445 F.2d 1000-1003, A.P. 126a-139a), and deeming it unnecessary to decide further whether the rescission was an act of de jure segregation (445 F.2d 1003, A.P. 139a), misconceived the final true basis of the district court's order enjoining the rescission.

3. The trial court erred in concluding that the rescission of the resolutions was an act of state-imposed segregation in and of itself.

The full history of the three resolutions and the rescission thereof is summarized at pp. 44 to 46 of the Statement.

The rescinded resolutions reassigned pupils, effective in September, 1969, from 15 schools.[40] These plans were rescinded and the substitute plans embodied in Resolution 1533 (PX 6, A. 2111a) were adopted by the Board on June

[39]Logic, as well as the district judge's own holdings, leads also to the same conclusion.

[40]PX 10, A. 2112a and PX 11, A. 2114a. Pupils from three senior high schools, four junior high schools, and eight elementary schools were reassigned. Only four of the fifteen schools were predominantly minority.

9, 1969, three months before their effective date. The previous plans were never put into effect as far as the pupils were concerned.[41] With the adoption and later rescission of the resolutions, *nothing happened* insofar as there was any school district action to affect racial proportions in the schools. To hold, as the district court did, that the rescission was a legislative act which "in and of itself was an act of de jure segregation" (303 F.Supp. 295, A.P. 35a, 313 F.Supp. 66, A.P. 52a) was an attempt by pure metaphysics to convert the substitution of unimplemented planning into an affirmative unconstitutional act.

The district court relied on *Reitman v. Mulkey*, 387 U.S. 369 (1967), as authority for the holding. 313 F.Supp. 67-69, A.P. 55a-57a. That case, we submit, does not support the holding. The district judge understood *Reitman* to strike down an initiated constitutional amendment which had the effect of repealing legislation "which recognized rights guaranteed by the equal protection clause." 313 F.Supp. 67, A.P. 55a. The amendment actually had the effect of repealing *pro tanto* all statutes forbidding private discrimination in housing. Its infirmity was not the repeal, but the finality of the action, which disabled every level of government from treating the problem, thereby authorizing and constitutionalizing the private right to discriminate. 387 U.S. at 377.[42]

In the case at hand, the rescission in no way disabled the board from continuing to deal with the educational problems of racial or socio-economic concentrations. After the

[41]As the district court put it, "True, the resolutions had not been carried out, but extensive preparations were in progress." 313 F.Supp. 67, A.P. 53a.

[42]In *Hunter v. Erickson*, 393 U.S. 385, 390 (1969), this Court expressly stated that it was not holding that the mere repeal of legislation enacted for the benefit of racial minorities violates the Fourteenth Amendment. *James v. Valtierra*, 402 U.S. 137, (1970) applied the same principle to repeal of legislation concerning other classifications.

rescission, the Board could and did take further legislative action in this regard (e.g. Resolution 1533, PX 6a, A. 2111a, and Resolution 1562, 445 F.2d 1010, A.P. 156a).

Nor were the rescinded resolutions aimed at recognizing constitutional rights. Of the 15 schools from which pupils were to be reassigned, only 4 had been found to have been the object of prior discriminatory acts, and, in those cases, as we have shown, there was no finding by the court of present segregatory effect and, accordingly, no existing constitutional violation at the time of trial as to any of those schools. Thus, the effect of the rescission was to repeal a mandatory racial balancing plan originally adopted in response to an undertaking, for educational reasons, to increase efforts to find solutions to the "educational problems of de facto . . . segregation."[48] The resolutions were to implement, as an educational policy, a racial balancing plan. This was within the discretionary power of the school board. But where no constitutional violation existed, the district court exceeded its authority in ordering the rescinded plans carried out. *Swann*, 402 U.S. 16.

The evidence was that the three resolutions represented pilot plans educationally, and were part of the long-range planning of the school district for improving educational quality. This is a process of trial and error, which all experts agreed was an extremely complex matter in which no certain answers were known. Any rule of constitutional law which would impute segregatory purpose and effect to the repeal of plans, proposed as a matter of educational policy, which include, among other measures, the reduction of racial or ethnic concentrations, would have a chilling effect on future educational efforts to solve the complex problems of public education. As Mr. Justice Harlan observed, in his dissent in *Reitman*,

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[48]Resolution 1490, (PX 2, A. 1992a-1996a).

> "I think that this decision is not only constitutionally unsound, but in its practical potentialities short-sighted. Opponents of state anti-discrimination statutes are now in a position to argue that such legislation should be defeated because, if enacted, it may be unrepealable." 387 U.S. at 395

Educational policy-making by the local school districts of the Nation should not be thus inhibited by the threat of being permanently enjoined to carry out every proposed innovation and experimental educational plan which happens to include measures for the reduction of racial or socio-economic imbalance as a matter of educational policy.

C. THE SCOPE OF THE REMEDY IS LIMITED BY THE EXTENT OF A VIOLATION.

Petitioners seek system-wide desegregation of the Denver public schools.

The background against which petitioners urge this argument regarding remedy is that of a school district practicing "covert segregation" with "hidden motives" involving "shams . . . surreptitous practices" . . . and "underhanded subterfuges." In this case there were no findings or evidence of such as to the Denver school district.

The findings of deliberate discrimination in the Denver school system, if sustained, are limited to only four predominantly minority schools which are only a small percentage of the 119 schools in the District and are located in a relatively small geographical area. No issue of system-wide discriminatory violations is before this court.

One of the axioms stated in *Swann* which should apply to a unitary system as well as a dual system is that:

> "(T)he nature of the violation determines the scope of the remedy. *Swann*, 402 U.S. 16.

Accordingly, the scope of the remedy must be limited to the geographical area and the schools in that area.[44]

In the Denver case, the nature of the violation, as we have shown was either the construction of one elementary school in 1960 and several minor elementary school boundary changes in the early 1960s, all in northeast Denver, or it was the modification of unimplemented mandatory racial balancing plans in 1969 involving the same area. If the violation was the former, it had no continuing or present effect at the time of trial because of demographic changes in the meantime. If the latter, the violation has been fully and precisely remedied by the reinstatement of the rescinded plans by injunctive decree of the district court.

Petitioners urge that various practical considerations require a remedy going far beyond the few schools where segregatory acts were found. The considerations they have discussed find no basis in the evidence nor in the findings of the courts below. The practicality argument grows out of a series of dual system cases involving dilatory practices resulting in unacceptable lack of progress. One of these cases, *Green*, 391 U.S. 430, illustrates the proper application of practical considerations. There, this Court had before it a problem involving a dual system operating two schools. The most obvious way to have created a unitary system in that situation was simple neighborhood zoning, 391 U.S. at 442, n. 6. This simple and workable solution had clearly been by-passed in favor of a scheme, predictably ineffective in that rural community, of "freedom of choice."

[44]Accord: Taylor v. Board of Education, 191 F.Supp. 181, (S.D.N.Y. 1961) appeal dismissed. 288 F.2d 600 (2nd Cir. 1961), 195 F.Supp. 231 (S.D.N.Y. 1961) affd. 294 F.2d 36 (2nd Cir. 1961) cert. den. 368 U.S. 940 (1961) The district court found that one elementary school (Lincoln) had been segregated by state action. The remedy was limited by the nature of the violation and the decree was for the desegregation of that school and did not require system-wide desegregation.

This Court simply refused to accept a remedy based on theoretical and unrealistic assumptions where a far more feasible and specific remedy was at hand. The same pragmatic approach here would find no further remedial intervention necessary in Denver.

We submit that there is no evidence in this case and no findings by the courts below which would warrant or constitutionally require system-wide racial balancing of the Denver school system.

III.

THE NEIGHBORHOOD SCHOOL POLICY, AS APPLIED IN DENVER, DOES NOT OPERATE TO DEPRIVE ANY PUPIL OF AN EQUAL EDUCATIONAL OPPORTUNITY, AND THE HOLDING OF THE COURT OF APPEALS TO THAT EFFECT SHOULD BE AFFIRMED.

A. INTRODUCTION

1. Neighborhood school policy—generally.

The neighborhood school policy, when impartially maintained and administered, does not violate the Constitution even though the result of such policy is racial imbalance in certain schools of the system.

Various circuits have considered this question and all have upheld the constitutionality of the neighborhood school policy.[45]

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[45] *Downs v. Board of Education of Kansas City*, 336 F.2d 988 (10th Cir., 1964), cert. den., 380 U.S. 914 (1965); *Deal v. Cincinnati Board of Education*, 369 F.2d 55 (6th Cir., 1966), cert. den., 389 U.S. 847 (1967); *Bell v. School City of Gary*, 324 F.2d 209 (7th Cir., 1963), cert. den., 337 U.S. 924 (1964), *Springfield School Committee v. Barksdale*, 348 F.2d 261 (1st Cir. 1965).

2. Equality of Educational Opportunity.

Equality of educational opportunity is conceded to be a constitutional right. It is also an ultimate objective in all educational planning. The elusive question is what constitutes equality of educational opportunity? If all children were born with equal mental capabilities and had equivalent environmental advantages, equal educational resources could be allocated mechanically.

The facts of life are different in that the planning and execution of educational programs is a complex social science.

Does the providing of equal fiscal, physical and teaching resources to all students and all schools constitute the providing of equal educational opportunities? Or, is a school district constitutionally required to evaluate the needs of children individually and by class (socio-economic or other) and provide greater but unequal resources to those who are more disadvantaged than others in order to arrive at the "equal protection" threshold? There is no question that such evaluations are repeatedly made as matters of educational policy. There is also no question that a school district constitutionally may allocate resources unequally for specific classes, e.g., mentally retarded, physically handicapped or culturally disadvantaged, as a matter of educational policy. The question presented in this case is whether, as a matter of Constitutional Law, courts should decree for all the nation, a requirement that all low-achieving students in a school district shall be considered a new class under the Constitution, and order the implementation of a new educational policy formulated by the judiciary and not by educational experts? It is obvious that such is beyond both the power and the expertise of the courts.

For years before the institution of this suit the school district in Denver had sought the optimum of equality of edu-

cational opportunity for all students. School buildings were maintained equally, core city schools were not shorted on educational materials but, to the contrary, they were provided extra dollars, lower pupil-teacher ratios, use of paraprofessionals, compensatory education programs, and many other programs and resources not made available to other schools.

Thus an unequal but greater quantity and quality of resources were furnished the court-designated schools which were found to be "inferior". The fact that the median achievement scores on standardized tests were below average in those schools was in spite of such action. What would have been the result but for the greater efforts and facilities furnished to the specific schools? Undoubtedly even lower median achievement scores and more drop outs.

Until sufficient controlled studies are made with empirical results, any attempt by the courts to decree educational programming through assignment of pupils by race, allocation of resources, or designation of other criteria would be well beyond the ability of the courts to perform and would constitute an unlawful exercise of the power of the courts under the present state of educational social science.

As is shown hereafter, the evidence is insufficient to establish any constitutional deprivation of "equal educational opportunity."

3. Points argued.

Petitioners claim that minority children attending certain Denver schools were consciously treated differently and discriminatorily and have been denied equal educational opportunities. We reply arguendo as follows: First, the existence of unequal educational opportunities in such schools, if true, was not caused by discriminatory acts of the respondents,

and did not, therefore, constitute a constitutional violation warranting judicial intervention.

Second, the trial court's conclusion that certain schools were "inferior" on the basis of median scores on standardized achievement tests was clearly erroneous. Third, there was no competent evidence in the record to support the trial court's conclusion that racial or ethnic imbalance was the cause of inferiority in any schools.

Fourth, the apparent lack of achievement in certain schools not being the result of state action (neither unequal allocation of resources nor racial or ethnic concentration) the remedy to alleviate existing educational difficulties is outside the province of the federal courts, and must be fashioned by the school authorities as educational policy.

B. THE SCHOOL DISTRICT DID NOT CAUSE THE ALLEGED INFERIORITY OF THE COURT-DESIGNATED SCHOOLS.

1. Summary of district court findings that low test scores evidenced inferior schools, that racial and ethnic concentrations caused inferior schools, but that the concentrations were not caused by the school district.

A clear summary of the claims as alleged in petitioner's complaint is found in the opinion of the court of appeals. 445 F.2d 994, A.P. 124. Under the main or second cause of action, three counts were urged at time of trial (the fourth count having been expressly abandoned). The first count, alleging deliberate and purposeful state-imposed segregation, was rejected by the trial court. The second count, which alleged an unequal allocation of resources to the core city schools was also, in effect, rejected by the district court.

The third count attacked the neighborhood school policy, even when operated without segregatory intent, claiming

that it causes racial and ethnic segregation in some schools, which, in turn, denies equal educational opportunity to pupils assigned there. A. 29a, 30a.

The district court made two rulings on the third count. First, the court denied relief merely upon a showing of racial concentrations resulting from the application of the neighborhood school policy, citing *Downs* and *Dowell*. 313 F.Supp. 76, A.P. 74a-75a.

Then the court found that certain schools with high proportions of Negro or Spanish surnamed pupils (the court-designated schools), although not segregated by state action, were, nevertheless, providing an unequal educational opportunity which was caused by the racial and ethnic concentrations.

This circular reasoning was rejected by the court of appeals, which reversed the trial court on the ground that there was no finding of state action causing the racial and ethnic imbalance said to be the cause of the lower achievement scores and inferior educational opportunity.

The trial court found that petitioners were not entitled to relief upon a mere showing of *de facto* segregation (313 F.Supp. 73, A.P. 67a), and that "[A] neighborhood school policy, even if it produces concentration, is not *per se* unlawful if it is carried out in good faith and is not used as a mask to further and perpetuate racial discrimination." 313 F.Supp. 76, A.P. 74a. The district court then rejected petitioners' claim that "the neighborhood school policy has been maintained by the School Board for the purpose and with the effect of segregating minority pupils." 313 F.Supp. 76, A.P. 73a.

The trial court's findings of unequal educational opportunity at the court-designated schools rest solely on the evidence of low average achievement and low morale (313

F.Supp. 77, 91, A.P. 76a, 100a) and that this condition was caused by racial or ethnic concentrations. 313 F.Supp. 80-82, A.P. 83-86a.

The district court reaffirmed this finding in the clearest terms in its later opinion on remedy. Reviewing the earlier order, the district court stated:

> "We found at the trial that the schools in question became segregated as a result of neighborhood housing patterns—at least that this was the substantial factor in producing the result. *It was not caused by positive law or as a result of official action.* 313 F.Supp. 81, 82, A.P. 111a. (emphasis added)

Thus, the trial court, having found unequal educational opportunity and having identified its cause as racial or ethnic concentration, nevertheless found that the concentration was not caused by the school district.

The trial court then became concerned with educational principles as opposed to *Constitutional Principles* and determined that, despite its findings that the neighborhood school policy was constitutional even though it produces (racial) concentrations, the court-designated schools should be desegregated.

2. *The court of appeals, in view of the trial court's findings, correctly reversed, finding no state action causing the educational outcomes at the schools in question.*

(a) The trial court had found that the school district did not cause the racial imbalance.

The opinion of the court of appeals shows that it fully understood that the District Judge had (1) found unequal educational opportunity in the court-designated schools on the

evidence of low test scores and high drop-out rates and other evidence of low morale, and (2) had concluded that the racial and ethnic concentration, "regardless of its cause," was the cause of the unequal educational opportunity. 445 F.2d 1003, A.P. 142a The court of appeals agreed with the district court that constitutional rights would be violated if the education in one school was sub-standard when compared with another school within the same school district, *"provided the state had acted to cause the harm."* 445 F.2d 1004, A.P. 143a (emphasis added).

But the court of appeals also understood that the district court had expressly found that the school district had not caused the racial and ethnic concentrations which had been found, in turn, to be the cause of the educational problems. The court of appeals itself concluded that the "educational difficulties [arise] from circumstances ouside the ambit of state action." 445 F.2d 1004, A.P. 144a. Later, in the discussion of plaintiffs' cross-appeal, the appellate court put it more plainly:

> "The trial court held that cross-appellants [petitioners herein] failed in their burden of proving (1) a racially discriminatory purpose and (2) a causal relationship between the acts complained of and the racial imbalance admittedly existing in those schools." 445 F.2d 1006, A.P. 418a

Racial imbalance in the schools can, and did in Denver, develop over a period of years when an impartially administered and racially neutral neighborhood pupil assignment policy was followed by the school district. But that policy, while it permits racial and ethnic change within school subdistricts, did not cause the adventitious racial imbalance in the schools, and both courts below expressly so found.

(b) The court of appeals correctly based its reversal of the district court on the absence of findings of causal relationship.

Petitioners, ignoring the fact that the district court expressly found no state action in the development of racial and ethnic imbalance in the court-designated schools, proceed to speculate as to various explanations for the same finding by the court of appeals. Rule 52, F.R.C.P., is an adequate explanation.

Petitioners suggest that the court of appeals confused indicia of inferiority with the cause of "inferiority". To the contrary, the court of appeals correctly noted that the indicia (low test scores and dropout rates) were obviously not the cause of the low test scores. 445 F.2d 1004, A.P. 144a.

Petitioners suggest that the court of appeals may have overlooked the district court's finding that racial and ethnic imbalance caused the alleged unequal educational opportunity. The court of appeals was entirely aware of this finding as it was the basis of its reversal as to the core city schools.

Finally, petitioners suggest that the court of appeals overlooked, in the record, the multiplicity of decisions by the school board (as to school locations, size and boundaries, pupil assignments, and educational input) as factors in causing unequal educational opportunity. To the extent these factors were part of the neighborhood school policy, they were held by the district court not to have caused the racial and ethnic imbalances. To the extent they refer to differences in teacher experience, the district court considered it a symptom, not a cause (313 F.Supp. 81, A.P. 83a), and the court of appeals found it insubstantial:

> "[W]e cannot conclude from that one factor [teacher experience]—as indeed neither could the

trial court—that inferior schooling is being offered." 445 F.2d 1004, A.P. 144a.

At the hearing on remedy, Dr. James S. Coleman testified that teacher experience and advanced degrees were not important factors (A. 1557a), and Mr. Smith, an elementary principal called by the plaintiffs confirmed that his new teachers were as capable and competent as those with more experience (A. 1701a).[46]

(c) The court of appeals did not require a showing of racial purpose, whether or not it is required.

The other claimed error, that the court of appeals required a finding of intent to deny equal educational opportunities to the pupils in the racially and ethnically imbalanced schools, is not relevant in view of the district court's finding that the imbalance in the core city schools was not "de jure" or state imposed. In any case, the appellate court's reference to racially motivated intent (in this part of its opinion) occurs only in connection with its observation that instances of judicial intervention in school systems in Pontiac, Cook County, District of Columbia, Manhassett, Hempstead, and Pasadena were cases where de jure segregation was expressly found, with its necessary element of racial purpose. 445 F.2d 1006, A.P. 1480.

This case is clearly distinguishable from *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) in which the issue was whether exclusion by race from a public accommodation could be excused by delegating state authority to a private party by contract. Here we are concerned with the power of the courts over educational decisions involving complex factors not caused by state action, not at-

[46]"Anyone who believes [inexperience] is a serious disadvantage for a teacher, has a faith in experience and degrees which is justified by no known evidence." N. Glazer, *Is Busing Necessary?* Commentary, March, 1972, p. 50, ——CONG. REC. —— (daily ed. March 13, 1972, S-3855).

tempted delegation of state authority with concomitant unconstitutional wrongs.

(d) The neighborhood school policy does not operate as a racial classification.

One other theme in petitioners' argument on this point remains to be dealt with. This is the contention that the school district maintained two kinds of schools, good schools and bad schools, and that the school district arranged to have good schools where non-Spanish white children predominate and bad schools where Negro and Spanish surnamed children predominate.[47] This means, the argument goes, that unequal schools were being provided on the basis of a racial or ethnic classification, which was not justified by any compelling state interest, and therefore was in violation of the Fourteenth Amendment.

But it is at this point that the argument loses sight of its causal predicate, which the court of appeals was careful to keep in view. The cause of the good schools and bad schools, according to the petitioners and the district court (313 F.Supp. 82, A.P. 86a), was the absence or presence of concentrations of children of certain racial or ethnic minorities in the schools. If this is the cause, then the school district cannot be providing or arranging for a poor school at one place and a good school at another unless it also controls the racial or ethnic makeup of the schools. This control, the courts below both held, the school district simply did not have or exert.

Nor did the school district set about to select or identify schools with high Negro or Spanish surname concentrations and proceed to arrange inferior education at such schools. This was manifestly impossible because it was the racial or

[47] "The violation found was not cast in terms of racial segregation but rather as the State's unequal provision of public education to Denver's minority children." (Pet.Br., p. 117).

ethnic concentrations, not the school district's allocation of resources to the schools, which caused, the trial court held, the inferior education.

In other words, since Denver's neighborhood school policy is racially neutral, it does not operate as a mechanism for racial or ethnic classification, and any racial or ethnic concentration which the neighborhood school policy permits or produces is not attributable to school district action, but to housing patterns. Accordingly, even assuming arguendo that the evidence in this case supports a finding that the racial concentration in some schools causes unequal educational opportunity in those schools, the inequality cannot be attributable to the racially neutral classification or to school district action.

3. The court-designated schools were located, built, and assigned attendance areas without any segregatory purpose or effect, and the school district has done nothing since to affect their racial composition.

The Denver school system is not and never has been a dual system (445 F.2d 1006, A.P. 148a), and the school authorities have not refused to admit any student at any time because of racial or ethnic origin. 313 F.Supp. 73, A.P. 67a.

Thus, when each of the court-designated schools was built and assigned its attendance area,[48] the school system was unitary in every sense of the word. Plaintiffs failed to prove that the school authorities or any other state agency had done anything to affect the racial composition of these schools.[49]

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[48]The newest of the court-designated schools (Smith) was built in 1955. (PX 106, A. 2042a; PX 20, Appendix 13-18).

[49]Except, arguendo, at Stedman and Hallett, but with no effect on their present racial compositions.

Not only did the courts below expressly find that there was no such segregatory action, as discussed above, but the elementary school subdistrict boundary maps in evidence in this case show this graphically.

4. Allocation of resources to core city schools were equal or greater.

In their brief, petitioners enumerate fourteen points as indicia of unequal educational opportunities in the court-designated schools. An analysis of those points discloses duplications, repetition of the same matters and nothing of a substantial objective nature to prove causation of alleged inferiority of the schools.

There was no proof and no finding of inadequate or disparate physical facilities or educational materials in the core city schools as compared to those in other parts of the city. Some of the buildings located in the core city were older, but the undisputed evidence was that they were as well maintained as any of the others in the city. Of the court-designated elementary schools, only 4 had been constructed before 1921 and three of those have had new additions since 1960 with the fourth one currently being replaced with a new building. None of the court-designated secondary schools was constructed prior to 1925. See Statement p. 47, supra, as to further details.

Much was made of teacher inexperience and transfers. All teachers in all schools had college degrees and there was no evidence of assignment to court-designated schools of any teacher who was any less educated than those assigned to other schools. There was no evidence that younger teachers were less effective in teaching than older teachers; in fact, the evidence was to the contrary. Much can be said for the greater effectiveness of younger teachers as compared to older ones, particularly many of those ap-

proaching retirement age at the elementary level. There was no evidence and no findings that teachers were more or less competent by reason of their greater or lesser experience in the Denver system or in a single school. See Statement, pp. 49, 50.

The dollar inputs to the predominantly minority schools were not only equal but often in excess of the amounts allocated to the other schools. See Statement, pp. 50, 51, supra. The curricula varied among schools depending on the needs and interests of the pupils but the same basic subjects were taught at each and every one of the schools. A. 1366a.

In the end, the only objective evidence of a cause in all of these fourteen points upon which petitioners could rely is that of teacher inexperience, assignment and transfer; but both lower courts found this was not a material factor in the lack of achievement by the pupils in the court-designated schools.

The other items contained in the fourteen points are not causes (e.g., drop out rates and achievement results) or are discussed in other parts of this brief (e.g., neighborhood schools and boundaries).

The resources allocated to the core city schools being at least equal and in many instances greater in quality or quantity, the conclusion of the trial court of "inferiority" in the court-designated schools must rest primarily upon outputs or results rather than inputs or resources. By reason of other factors not within the control of the state, particularly the early childhood deprivations of children from low socio-economic environments, it is erroneous to infer that below average outputs or achievement levels were caused by unequal inputs or resources.

C. ON TWO OTHER GROUNDS THE DISTRICT COURT'S JUDGMENT SHOULD HAVE BEEN REVERSED.

There were two additional reasons for refusing to affirm the district court's conclusion that Fourteenth Amendment rights were being denied to pupils attending the court-designated schools. The court of appeals did not find it necessary to discuss these additional reasons because of the lack of any finding of a causal connection to state action. But these additional deficiencies in the district court's approach to the core city schools should be discussed, we believe, because of their importance to the entire question of equal protection principles as they apply to public education.

The district judge succinctly summarized his methodology and perception of the problem in the post-trial opinion on remedy:

> "[T]he [de facto] segregated core city schools in question were providing an unequal education opportunity to minority groups as evidenced by low achievement and morale. The causes of this inferiority were held to be the segregated condition, together with concentration of minority teachers, low teacher experience and high teacher turnover in each of the schools." 313 F.Supp. 91, A.P. 100a

Indicia are clearly distinguished from causes, in the court's view. Evidence or indicia of "inferior" schools were found to be low achievement and morale; the cause of such "inferiority" was held to be primarily (313 F.Supp. 81, A.P. 83a, 313 F.Supp. 82, A.P. 86a), racial or ethnic concentrations, together with lower teacher experience. Respondents have previously set forth the evidence on concentration of minority teachers, teacher experience and turnover. See Statement, pp. 47-50.

Both the indicia and the cause of what the district court found to be unequal educational opportunity in its designated schools must be questioned.

1. Achievement test scores are not a valid basis for comparing educational opportunity among schools.

Of the two signs or indicia of inferior schools, one, low morale, was the consequence of the other, pupil achievement.[20] Low morale was a combination of (a) relatively high teacher turnover, which produces relatively lower teacher experience (313 F.Supp. 79-80, A.P. 80a-82a), and (b) relatively high pupil dropout rates (at the secondary level) 313 F.Supp. 80, A.P. 83a. In other words, the district court interpreted the tendency of teachers with seniority, under the negotiated agreement with the teachers' bargaining agent, to transfer to other schools, and the tendency of pupils to leave school when legally permitted, as evidence of low morale within the schools involved. But the court evidently attributed these factors to the low pupil achievement in the schools.

Thus, the sole, or at least dominant, sign of an inferior school, in the district court's view, was relatively low median scores, by school, on standardized achievement test scores. We submit that such evidence is not sufficient as a basis for finding a violation of the Fourteenth Amendment.

The results of tests involved in this suit, the Stanford achievement test given in May, 1968, were reported (PX 83, 379) in two different ways. Both displayed the scores of the individual pupils, by school, along a scale. One scale (a percentile chart) compared the scores of the school's pupils against nation-wide scores of pupils at that grade level. The other scale (a grade equivalent chart) compared the pupils'

[20] "Low standards and *consequently* low morale." 313 F.Supp. 77, A.P. 76a. (emphasis added).

scores against the test publisher's grade equivalent expressed by the grade number followed by a decimal point and a number expressing the month of the school year.[51]

There were eight different tests in the Stanford battery. Plaintiffs averaged the median grade equivalent scores for the eight tests, by school, and compared these averages with a city-wide average, similarly computed. This analysis showed that in the third grade in 1968, the Denver average median grade equivalent was 3.6. Of the court-designated elementary schools, their average grade equivalent ranged from 2.7 (Mitchell, 70.9% Negro) to 3.4 (Elmwood, 91.6% Spanish surnamed) and averaged 3.0. In other words, the average performance on this test by children in the schools selected by the court was about 6 months behind the city-wide average.

But both the percentile charts and the grade equivalent charts also show the *range* of performance, and these charts show that third grade children at Mitchell, for example, tested as high as 7th grade 5th month in word study skills, and above the 85th percentile, compared with the national performance, in all eight tests, and at the 99th percentile in three of them. This wide range of individual pupil performance in the court-designated schools was virtually the same as in all other schools in the Denver system.

Another comparison made with these test data by the school district was between expected or predicted achievement test performance based on IQ tests given earlier, and the actual achievement test results. This would give the staff and teachers some measure of how well their pupils were performing on the achievement tests in relation to their abilities as measured by the IQ tests. Generally, all Denver school children performed at or above their expectancies. The reports to teachers and parents, accordingly, could

[51]Thus, 3.6 means third grade, sixth month.

speak positively and encouragingly about the results of the pupils' and teachers' efforts. Where results fell short of expectancies, the report said so."[59]

All of this shows, we submit, that pupils in the court-designated schools achieved not only throughout the entire range of performance, but also in accordance with their capabilities as measured by the IQ tests. This does not show denial of opportunity to achieve on a district wide basis.

Recent intensive studies of the Coleman Report (PX 500) reach the same conclusion. Henry S. Dyer, Vice President of the Educational Testing Service, writing on "The Measurement of Educational Opportunity" in the published papers deriving from the Harvard University Faculty Seminar on the Coleman Report[60] criticizes both inputs and outputs as valid measures of educational opportunity. Dyer regards it as a serious fallacy to assume that "any difference in the results constitutes a measure of the degree to which [schools] are unequal."[61] He points to both dropout rates and achievement test scores as the usual measurements of results, and says of the latter:

> "The tendency is to assume that if on a reading test the 6th-grade pupils in a slum school average X points lower than those in a school in white suburbia, then X is the measure of the difference between the two schools in the effectiveness of reading instruction. The case may be quite the

[59]Petitioners do not quote, at page 49 of their brief, the full comment on the Wyatt School tests, which said, "A comparison of these scores with those of pupils tested in 1953 reveals gains at all levels of ability. Several deficiencies have been corrected, and the general position of the more able and average pupils is much stronger. A need is indicated for continued remedial work in the language area. The faculty should be well pleased with these achievements." (PX 379).

[60]Mosteller and Moynihan, *On Equality of Educational Opportunity*, Vintage Books, New York, 1972.

[61]Id, p. 515.

> opposite: the slum school may be *more* effective than the suburban school in upgrading reading competence, especially in light of the deficiencies it has had to overcome. Thus, the pupils' level of performance as they emerge from any phase of the educational system tells nothing in itself about how well the system is functioning. One needs to know, in addition, what the pupils have *gained* during the time they have been under instruction, how much of the gain may be reasonably attributed to the instruction, and how much to factors beyond the reach of the school." (Id, p. 515)

As an advocate for petitioners' position has put it, "Insofar as the [equal educational opportunity] theory relies in part on educational outcomes, especially to prove that either inequality or harm result from disparate inputs, it is suspect."[55] Here, there was no finding of effectively disparate inputs, and the court was left only with a disparity of outcomes—differences in achievement test scores. On such a suspect basis a constitutional violation should not rest.

Dr. Coleman has also published a most enlightening critique of his earlier publications and frankly states it was not intended to and should not be used as forensic evidence in determining constitutional issues.[56] He says:

> "It's probably not appropriate to say on achievement grounds alone that segregated schooling does not provide equality of educational opportunity. There is not sufficient evidence to show that the kind of benefits to lower-class children that arise

[55]Dimond, op. cit., pp. 13, 14.

[56]Coleman on The Coleman Report, Education Researcher, March, 1972, Vol. 1, No. 3, p. 13, published by American Educational Research Association, Wash. D.C.

from a socio-economically heterogeneous or racially heterogeneous school can't also be provided by other means. I don't think a judge can say there is prima facie evidence of inequality in educational opportunity on achievement grounds if there is school segregation. In this sense, I think judges have looked at that study and used the results more strongly than the results warrant.

"I remain uncertain about the appropriate role of social science evidence or statistical evidence in relation to the courts. The concept of evidence by lawyers or judges is very different from the concept of evidence in social science. When results show that certain kinds of attendance patterns provide higher achievement for children from lower socio-economic levels, as our results did, the results ought to *contribute* to the question of whether schools should be integrated, and to the decision of how much effort should be put into school integration. But I don't think that a judicial decision on whether certain school systems are obeying or disobeying the constitution ought to be based on that evidence."

2. *The conclusion that racial or ethnic concentrations are the principal cause of "inferior" schools is not supported by expert opinion relevant to Denver or by any other competent evidence.*

The only expert on this issue called by petitioners at the trial on the merits was Dr. Dan Dodson, professor of education from New York City.[57] Dr. Dodson admittedly knew nothing of the problems in the Denver schools (A. 1507a) nor of the minority groups in Denver. A. 1506a. He testi-

[57] It was later, at the hearing on the question of remedy, that the court heard the other educational experts.

fied at length as to generalities of achievement as related to race and socio-economic class. The trial judge pressed Dr. Dodson for his "opinion as to causation." A. 1472a. Dr. Dodson answered by saying that a school has a problem of adjusting its programs to minority children, and then drifted off into an abstract account of negative community attitudes and low morale in predominantly minority schools. A. 1473a. He did not directly answer the question until cross-examination, when he finally stated:

> "Q. Now, isn't it also true that in your study you found that race is not causally related to the achievement level in these minority schools? A. That's right." (A. 1508a)

The court also gathered from Dr. Dodson that the "Negro community" typically regards a majority-Negro school as inferior. 313 F.Supp. 81, A.P. 84a. But the professor was not speaking of Denver, where, in an opinion survey conducted for the Special Study Committee in 1963, only 4% of Negro parents believed that minority children have less opportunity for a good education in Denver's schools. PX 20, Appendix 38, Table 2.

The trial court noted that the two study committees had recognized the possibility that racial and ethnic concentrations might be a causative factor, and that the school board had adopted a policy recognizing the desirability of reducing such concentrations. 313 F.Supp. 81, 82, A.P. 85a, 86a. But views and policy goals such as these do not suffice as proof of a proposition upon which educational policy is to be constitutionally mandated by judicial intervention.

The evidence in this case is, in fact, to the contrary. The significant cause of poor achievement test performance, the experts agreed, was socio-economic class, not race. In addition to Dr. Dodson's admission to that effect (A. 1508a),

Dr. James S. Coleman of Johns Hopkins University, author of the celebrated Coleman Report on Equality of Educational Opportunity testified:

> "The Court: Well they say it's the middle class—upper middle class influence that produces most significantly; whether the students are Negro or whatever they are.
> "The Witness: Yes, sir. That's certainly the evidence of our survey." (A. 1535a, 1536a)

And later:

> "Q. And, regardless of the race, if it's a low socio-economic homogeneous neighborhood, you find low achievement? A. Yes.
>
> "Q. And that is true regardless of the racial composition of the school, if it's a low socio-economic area? A. Yes."
>
> "The Court: Well, that's a problem for the legislators or the school board; not for the Court." (A. 1558a)

In short, if inferior schools are not caused by racial or ethnic concentrations, and if, further, as both courts below have held, such concentrations were not caused by the school district, then the court of appeals was surely correct in refusing to find a violation of the equal protection clause of the Fourteenth Amendment.

D. EDUCATIONAL DIFFICULTIES ARISING FROM CIRCUMSTANCES NOT CAUSED BY STATE ACTION ARE NOT WITHIN THE POWER OF FEDERAL COURTS TO RESOLVE. THE REMEDY FOR EDUCATIONAL PROBLEMS AS DISTINCT FROM CONSTITUTIONAL VIOLATIONS MUST BE LEFT TO THE PLENARY POWERS OF SCHOOL AUTHORITIES.

1. Absent a constitutional violation, there is no authority for a court to order a remedy.

The court of appeals held that federal courts are without the power to play a role in correcting educational deficiencies arising from circumstances outside the ambit of state action 445 F.2d 1004, A.P. 144a, 145a. This holding is soundly based not only on the decisions of four circuit courts which have considered cases of racial imbalance not caused by state action (*Downs*, *Deal*, *Barksdale*, and *Bell* supra), but also on this Court's decision in *Swann:*

> ". . . [I]t is important to remember that judicial powers may be exercised only on the basis of a constitutional violation. Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. Judicial authority enters only when local authority defaults.
>
> "School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the

broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court." (402 U.S. 1, at 16)

2. *The scope of the remedy is limited by the Civil Rights Act of 1964 as to "de facto segregation".*

The district court recognized that it could not, under existing law, remedy self-imposed "segregation" resulting from housing patterns. Nevertheless, it determined that racial imbalance beyond an arbitrary standard set by the court created a denial of equal educational opportunity. The court's remedy for such denial was reduction of the minority pupil population in each affected school to a point below 50%. This necessarily required reassignment of pupils based on race alone. It also necessarily required, given the geography and housing patterns in Denver, extensive busing to accomplish such reassignment.

Thus, the trial court's remedy was contrary to the various Circuit Court holdings previously cited herein that *de facto* segregation or racial imbalance cannot be judicially changed. In adopting such a remedy, the district court imposed its notions of social and educational policy upon a coordinate branch of government. This was a usurpation of the powers properly delegated by the people of Colorado to the defendant Board of Education. It also violated congressional policy as expressed in Title IV of the Civil Rights Act of 1964, 42 U.S.C. §2000c. This Court, in *Swann*, recognized and commented on this matter as follows:

"The legislative history of Title IV indicates that Congress was concerned that the Act might be read as creating a right of action under the Four-

> teenth Amendment in the situation of so-called 'de facto segregation,' where racial imbalance exists in the schools but with no showing that this was brought about by discriminatory action of state authorities." (401 U.S. 1, at 17, 18)

The Civil Rights Act of 1964 treats school desegregation in detail and ultimately determines that *de facto* or voluntary segregation shall not be treated by the courts. The Act provides that nothing contained therein "shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance or otherwise enlarge the existing power of the court to insure compliance with constitutional standards. 42 U.S.C. §2000c-6(a)(2).

Since the district court admittedly was not remedying *de jure* segregation in this portion of its order, it was in violation of clear Congressional policy.

3. The Denver school district has constantly been searching for better means to improve educational results.

The Special Study Committee had informed the Denver school board, in 1964, that it was a "real possibility" that "concentrations of races and ethnic groups because of housing patterns" "may result in educational inequalities." (PX 20, A. 2003a) The board promptly acted upon the committee's report and adopted, effective May 6, 1964, Policy 5100, which recognized two important principles: (1) that the neighborhood school principle should be adapted in order to reduce concentrations of minority racial and ethnic groups in the schools,[88] and (2) that the educational pro-

[88] "The continuation of neighborhood schools has resulted in the concentration of some minority racial and ethnic groups in some schools. Reduction of such concentration and the establishment of more heterogeneous or diverse groups in schools is desirable to achieve equality

gram should be tailored to the individual educational needs of the children."[89]

To implement this policy, and in further responding to the committee recommendations, the board also established pupil assignment guidelines which aimed for maximum racial and ethnic heterogeneity consistent with the neighborhood school policy (PX 102), and established the optional pupil transfer plan recommended by the committee (Howard L. Johnson, A. 299a) known as Limited Open Enrollment (LOE).

The 1964 LOE plan, was used mainly and increasingly by Negroes (DX CG, A. 2126a) as a means to transfer to other schools. It was later, in 1968, changed to make it more effective in furthering racial and ethnic heterogeneity in the schools. The improved plan, Voluntary Open Enrollment (VOE), provided for majority-to-minority transfers with transportation provided. The VOE plan was given wide publicity (PX 10, A. 2112a) and was explained in detail to parents (DX J, A. 2156a). By the fall of 1969, in its second semester of operation, nearly 9% of Denver's Negro elementary pupils chose VOE as a means to transfer to a school where they would be in a minority.[90]

The potential of a voluntary transfer plan such as Denver's with its majority-to-minority limitation and with transportation provided should not be underestimated as an effec-

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of educational opportunity. This does not mean the abandonment of the neighborhood school principle, but rather the incorporation of changes or adaptations which result in a more diverse or heterogeneous racial and ethnic school population, both for pupils and for school employees." (PX 1, A. 1989a, 1990a).

[89] "Because individuals differ greatly in their backgrounds, their capacities, and their motivations, equality of educational opportunity must not be conceived as the same opportunity for each person; that is, for example, as schools with the same curriculum, guidance, and instruction." (PX 1, A. 1989a).

[90] DX VA, A. 2160a, last page (51), and PX S-1, A. 2166a, showing 728 of Denver's 8,250 Negro elementary pupils participating.

tive mechanism for reducing racial imbalance while giving due recognition to individual choice and perception of educational need. Denver's plan should not be confused with freedom of choice plans which have been used elsewhere as a device to impede the disestablishment of dual systems.

In addition to the opportunity and encouragement afforded to Negro and Spanish-surnamed pupils to transfer to schools where they would no longer be in a majority, the school district reaffirmed, in Resolution 1562 adopted May 6, 1970 (A. 1709a), its intention to try to find answers to educational difficulties shown by achievement test results. The text of the resolution is set forth as an appendix to the opinion of the court of appeals. 445 F.2d 1010, A.P. 156a-158a.

4. Even if the courts had the power to intervene in solving the educational problems and the competence to prescribe effective educational measures, the remedy urged by petitioners—racial and ethnic balancing—would not meet the tests of either practical effectiveness or recognition of competing values.

Given the district court's theory that racial or ethnic imbalance causes poor schools, the remedy of racial balancing had at least a surface appearance of consistency. But the experts at the hearing on remedy brought the proceedings about on "a new tack." After hearing Dr. Coleman explain that the social class composition of the school, not its racial makeup, was the operative factor, the district judge caught sight of a new explanation for poor academic achievement: "[I]t's not the schools at all, it's the students and their economic and cultural deprivation that makes the educational experience one that is non-competitive." (A. 1546a)

Dr. Coleman's testimony was consistent with the conclusion of the Coleman Report itself:

> "[T]he apparent beneficial effect of a student body with a high proportion of white students comes not from racial composition per se, but from the better educational background and higher educational aspirations that are, on the average found among white students." (PX 500, p. 307)

Dr. Neal Sullivan, testifying mainly from his experience as a school administrator[81] felt that each city should develop its own plan. A. 1589a. He described his experience in Berkeley, California, where a racial balancing plan was adopted as a matter of educational policy. But he felt that in a large city like Boston (with 100,000 public school pupils, comparable to Denver) the solution to school problems would be the construction of large educational parks with massive state financial aid. A. 1565a. He had no knowledge regarding the Denver school system and could offer no prescription tailored for Denver.

Dr. Robert O'Reilly, who likewise knew nothing about Denver, was called by plaintiffs mainly to give his opinion that compensatory educational programs, as tried in various places in the country, were not significantly effective in raising the scholastic achievement of minority children. A. 1928a. He described such programs as merely increasing the educational inputs, and stated that "[t]here is no indication that these [programs] would necessarily work in an integrated setting." A. 1929a, 1930a. He was utterly unable to suggest any educational program to help minority pupil achievement beyond mere racial balancing. A. 1931a-1934a. And the most he could say for racial balancing was that "[I]t can help." A. 1935a.

Both Dr. Sullivan and Dr. O'Reilly agreed with Dr. Cole-

[81] "School administrators typically think what they're doing is great." O'Reilly, A. 1956a.

man that they were talking about socio-economic balancing, not necessarily racial balancing (A. 1599a, A. 1950a), although Dr. O'Reilly (who had never previously studied or visited Denver, A. 1948a), felt, from talking with others, that there was a correlation between race and social class in Denver (A. 1947a), so that racial and socio-economic balance would be the same thing.

In any case, the Coleman Report, as more recently studied, does not support the conclusion that racial or socio-economic balancing would have significant educational effects.[63] Dr. Thomas F. Pettigrew[64] and others, in one of the papers from the Harvard Seminar on the Coleman Report[65] concludes that:

> "Our findings on the school racial composition issue, then, are mixed . . . the initial *Equality of Educational Opportunity* survey overstressed the impact of school social class. . . . When the issue is probed at grade 6, a small independent effect on schools' racial composition appeared, but *its significance for educational policy seems slight.*" (pp. 351, 351) (emphasis added)

With such doubt as to the educational efficacy of racial or ethnic balancing, it seems fair to raise the question of competing social values which are diminished by any mandatory plan of pupil assignment by racial or ethnic classification.

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[63]See Coleman on the Coleman Report, pp. 118, 119, supra. A current analysis of race and achievement describes several studies which cast doubt upon the theory that racial balance will improve achievement of minority students. D. Armor, *The Evidence on Busing*, The Public Interest, No. 28, Summer 1972, p. 90.

[64]The principal author of *Racial Isolation in the Public School*, (PX 27).

[65]"Race and the Outcomes of Schooling," in *On Equality of Educational Opportunity*, supra note 53.

Beyond the obvious values of a neighborhood pupil assignment plan which includes administrative efficiency, safety, and convenience, there is the matter of the associational values and desires of the pupils and their parents.

The district judge expressed doubt that the Hispano[65] community in Denver would accept reassignment of their children outside their neighborhoods. A. 1515a, 1516a. This view is confirmed in an article by Mr. Alan Exelrod, one of the attorneys for Amicus Curiae, Mexican-American Legal Defense and Educational Fund, in which he reports that "in large urban areas, such as . . . Denver . . . there is little desire for integration. The leaders of these 'barrios' resist education policies which undermine community control of schools and retard the enactment of bilingual/bicultural education."[66]

Another value is the one just suggested—preserving or developing a measure of localized control of school affairs. One certain consequence of the remedy as was decreed by the district court is the ever-increasing centralization and enlargement of school administrative units, with corresponding loss of community control and individual self-determination.[67]

Finally, there is the matter of balancing the interests of all concerned. The court of appeals for the 1st Circuit after holding that the Constitution does not require racial balanc-

[65]"Hispano" is used in Denver because most Spanish origin persons there come from rural New Mexico and southern Colorado (PX 20, A. 2002a) rather than from Mexico. Dr. Valdes (Pet. Br., p. 5, n. 1) writes, " 'Chicano' is the diminutive of 'Mejicano', and is, therefore, quite restrictive, and can be used only when referring to Mexicans or Mexican-Americans." (*La Luz*, June, 1972, p. 61).

[66]*Inequality in Education*, Center for Law and Education, Harvard University, August 3, 1971, p. 28.

[67]See, generally, A. Bickel, *The Supreme Court and the Idea of Progress*, (1970), esp. pp. 134, 135.

ing in the absence of state-imposed segregation, observed that:

> "When the goal is to equalize educational opportunity for all students, it would be no better to consider the Negro's special interests exclusively than it would be to disregard them completely." *Springfield School Committee v. Barksdale*, 348 F.2d 261, at 264. (1st Cir. 1965)

The problems of modern education are far too complex to yield to simplistic solutions of mathematical racial or ethnic balancing. As plaintiffs' witness, Dr. O'Reilly, said:

> "So, what I'm trying to communicate to you, I guess, is that this is a very unsettled field. There are no hard and fast rules to go on. It's very unlikely that anybody is ever going to come up with a treatment that is going to be generally effective with minority students at all. What has to be done is basically many, many years of experimentation in which we slowly and carefully identify and develop specific programs designed for specific groups, specific minority groups. Because they differ so greatly." (A. 1932a)

The Denver schools will continue to search for ways to improve education for all, while providing maximum choice of school assignment for each pupil consistent with its established policy of maximum feasible racial and ethnic heterogeneity.[40] This process should not be disrupted by the imposition of doubtful policies through judicial intervention without basis in constitutional violation.

The remedy for racial imbalance as adopted by the Denver School Board in May, 1970, and submitted to the district

[40]Resolution 1562, 445 F.2d 1010 A.P. 156a.

court at the hearing on remedies provided for voluntary transfer (VOE) rather than mandatory, with transportation furnished and space guaranteed. This was not a subterfuge as in *Green*, rather it was a bona fide effort by the respondents to meet the suggestions of the district court made at the close of the trial on the merits. It was a proposal by the Board to give each pupil whose race was the majority in his neighborhood school the right to go to any other school where his race would be in the minority.

Even though the pupils in the core city schools were not subjects of state-imposed segregation, such a plan gave each Negro or Hispano student the *right* to transfer to a predominantly Anglo school, thus meeting all constitutional criteria guaranteed by the equal protection clause. With transportation furnished and space guaranteed, every element of equal protection was present in fact as well as in theory.[40]

In contrast to the petitioners' experts who admittedly knew nothing about the Denver school system and could offer no plans tailored to the Denver problems, substantial expert testimony was received from members of the administrative staff of the Denver public schools. These men knew the city, the schools, the faculties, the available resources and allocation thereof and had worked closely with the Board of Education and the two study committees.

It would be beyond the scope of judicial power and certainly beyond anything that this Court has done heretofore to accept the general non-specific opinions of the petitioners' experts and make them "the law of the land" under the guise of enlarging the scope of *Brown I*. Decreeing racial and ethnic balancing as a constitutionally-required remedy

[40]See *McLaurin v. Okla. State Regents*, 339 U.S. 637 (1950): "There is a vast difference — a Constitutional difference — between restrictions imposed by the state which prohibit the intellectual commingling of students, and the refusal of individuals to commingle where the state presents no such bar.

for equalizing educational outcomes in all the schools throughout the Nation would be unsound not only as a matter of educational fact, but also as a matter of constitutional law.

CONCLUSION

Respondents pray that this Court order as follows:

1. That the judgment of the court of appeals reversing that part of the district court judgment pertaining to the core-city or court-designated schools be affirmed.

2. That the Court grant the conditional cross-petition for certiorari in Case No. 71-572; and that the judgment of the court of appeals affirming the judgment of the district court in all other respects be reversed.

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